

SELECTED GUIDELINE APPLICATION DECISIONS FOR THE ELEVENTH CIRCUIT



**Prepared by the
Office of General Counsel
U.S. Sentencing Commission**

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TABLE OF CONTENTS

	<u>Page</u>
CHAPTER ONE: <i>Authority and General Application Principles</i>	1
Part B General Application Principles	1
§1B1.1	1
§1B1.2	1
§1B1.3	1
§1B1.4	3
§1B1.10	3
§1B1.11	4
CHAPTER TWO: <i>Offense Conduct</i>	4
Part A Offenses Against the Person	4
§2A1.1	4
§2A3.1	4
§2A3.2	5
§2A4.1	5
§2A6.1	6
Part B Basic Economic Offenses	6
§2B1.1	6
§2B3.1	6
§2B3.2	9
§2B4.1	9
§2B6.1	9
Part D Offenses Involving Drugs	10
§2D1.1	10
§2D1.2	13
Part F Offenses Involving Fraud and Deceit [Deleted]	14
§2F1.1	14
Part G Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity	15
§2G1.1	15
§2G2.2	16
§2G2.4	17
Part J Offenses Involving the Administration of Justice	18
§2J1.7	18
Part K Offenses Involving Public Safety	18
§2K2.1	18
§2K2.4	21
Part L Offenses Involving Immigration, Naturalization, and Passports	22
§2L1.2	22

	<u>Page</u>
§2L2.1	25
Part N Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws ..	26
§2N2.1	26
Part P Offenses Involving Prisons and Correctional Facilities	26
§2P1.1	26
Part Q Offenses Involving the Environment	26
§2Q1.3	26
Part R Antitrust Offenses	27
§2R1.1	27
Part S Money Laundering and Monetary Transaction Reporting	27
§2S1.1	27
Part T Offenses Involving Taxation	28
§2T1.1	28
Part X Other Offenses	28
§2X1.1	28
 CHAPTER THREE: <i>Adjustments</i>	 29
Part A Victim-Related Adjustments	29
§3A1.1	29
§3A1.2	30
§3A1.3	30
Part B Role in the Offense	30
§3B1.1	30
§3B1.2	31
§3B1.3	32
§3B1.4	35
Part C Obstruction	35
§3C1.1	35
§3C1.2	37
Part D Multiple Counts	38
§3D1.2	38
Part E Acceptance of Responsibility	38
§3E1.1	38
 CHAPTER FOUR: <i>Criminal History and Criminal Livelihood</i>	 40
Part A Criminal History	40
§4A1.1	40
§4A1.2	40
§4A1.3	42
Part B Career Offenders and Criminal Livelihood	43
§4B1.1	43
§4B1.2	45

	<u>Page</u>
§4B1.4	45
CHAPTER FIVE: <i>Determining the Sentence</i>	47
Part C Imprisonment	47
§5C1.2	47
Part D Supervised Release	49
§5D1.3	49
Part E Restitution, Fines, Assessments, Forfeitures	50
§5E1.1	50
§5E1.2	50
Part G Implementing the Total Sentence of Imprisonment	51
§5G1.1	51
§5G1.2	51
§5G1.3	51
Part K Departures	52
§5K1.1	52
§5K1.2	52
§5K2.0	53
§5K2.5	55
§5K2.7	56
§5K2.11	56
§5K2.13	56
CHAPTER SEVEN: <i>Violations of Probation and Supervised Release</i>	57
Part B Probation and Supervised Release Violations	57
§7B1.3	57
§7B1.4	57
APPLICABLE GUIDELINES/EX POST FACTO	58
CONSTITUTIONAL CHALLENGES	58
Eighth Amendment	58
FEDERAL RULES OF CRIMINAL PROCEDURE	58
Rule 11	58
OTHER STATUTORY CONSIDERATIONS	58
18 U.S.C. § 201(c)(2)	58
18 U.S.C. § 924(c)	58
18 U.S.C. § 2326	59
21 U.S.C. § 851	59

POST-BOOKER (UNITED STATES V. BOOKER, 125 S. Ct. 738 (2005))	59
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TABLE OF AUTHORITIES

	<u>Page</u>
<i>Castillo v. United States</i> , 200 F.3d 735 (11th Cir.), <i>cert. denied</i> , 531 U.S. 845 (2000)	40
<i>In re Anderson</i> , 396 F.3d 1336 (11th Cir. 2005)	63
<i>McCarthy v. United States</i> , 135 F.3d 754 (11th Cir.), <i>cert. denied</i> , 525 U.S. 1009 (1998)	46
<i>United States v. Grinard-Henry</i> , 399 F.3d 1294 (11th Cir.), <i>cert. denied</i> , 125 S.Ct. 2279 (2005)	62
<i>United States v. Acosta</i> , 287 F.3d 1034 (11th Cir.), <i>cert. denied</i> , 537 U.S. 926 (2002)	47
<i>United States v. Adams</i> , 329 F.3d 802 (11th Cir. 2003)	18
<i>United States v. Adams</i> , 403 F.3d 1257 (11th Cir. 2005)	40
<i>United States v. Adams</i> , 74 F.3d 1093 (11th Cir. 1996)	27
<i>United States v. Aduwo</i> , 64 F.3d 626 (11th Cir. 1995)	19
<i>United States v. Alfaro-Zayas</i> , 196 F.3d 1338 (11th Cir. 1999)	22
<i>United States v. Allen</i> , 87 F.3d 1224 (11th Cir. 1996)	53
<i>United States v. Anderson</i> , 200 F.3d 1344 (11th Cir. 2000)	47
<i>United States v. Anderson</i> , 328 F.3d 1326 (11th Cir. 2003)	22
<i>United States v. Antonietti</i> , 86 F.3d 206 (11th Cir. 1996)	10
<i>United States v. Armstrong</i> , 347 F.3d 905 (11th Cir. 2003)	3
<i>United States v. Auguste</i> , 392 F.3d 1266 (11th Cir. 2004)	6
<i>United States v. Bailey</i> , 123 F.3d 1381 (11th Cir. 1997)	4
<i>United States v. Bald</i> , 132 F.3d 1414 (11th Cir. 1998)	14
<i>United States v. Banks</i> , 347 F.3d 1266 (11th Cir. 2003)	35
<i>United States v. Bankston</i> , 121 F.3d 1411 (11th Cir. 1997), <i>cert. denied</i> , 522 U.S. 1067 (1998)	40
<i>United States v. Barakat</i> , 130 F.3d 1448 (11th Cir. 1997)	32
<i>United States v. Barbour</i> , 70 F.3d 580 (11th Cir. 1995), <i>cert. denied</i> , 517 U.S. 1147 (1996)	6
<i>United States v. Bates</i> , 213 F.3d 1336 (11th Cir.), <i>cert. denied</i> , 531 U.S. 1056 (2000)	6
<i>United States v. Bazemore</i> , 138 F.3d 947 (11th Cir. 1998)	21
<i>United States v. Bender</i> , 290 F.3d 1279 (11th Cir.), <i>cert. denied</i> , 537 U.S. 1037 (2002) . . .	16, 17
<i>United States v. Bennett</i> , 368 F.3d 1343 (11th Cir. 2004), <i>vacated at</i> 125 S. Ct. 1044 (2005), <i>opinion reinstated</i> , 2005 WL 1052236 (11th Cir. 2005)	1, 30, 35
<i>United States v. Bidwell</i> , 393 F.3d 1206 (11th Cir. 2004), <i>cert. denied</i> , 125 S. Ct. 1956 (2005)	51

	<u>Page</u>
<i>United States v. Bourne</i> , 130 F.3d 1444 (11th Cir. 1997)	38
<i>United States v. Bozza</i> , 132 F.3d 659 (11th Cir. 1998)	18
<i>United States v. Bradford</i> , 277 F.3d 1311 (11th Cir.), <i>cert. denied</i> , 537 U.S. 918 (2002)	26, 36, 38, 52
<i>United States v. Bravo</i> , 203 F.3d 778 (11th Cir.), <i>cert. denied</i> , 531 U.S. 994 (2000)	47
<i>United States v. Britt</i> , 388 F.3d 1369 (11th Cir. 2004)	32
<i>United States v. Brown</i> , 104 F.3d 1254 (11th Cir. 1997)	3
<i>United States v. Brown</i> , 332 F.3d 1341 (11th Cir. 2003)	21
<i>United States v. Brown</i> , 47 F.3d 1075 (11th Cir. 1995)	59
<i>United States v. Brownlee</i> , 204 F.3d 1302 (11th Cir. 2000)	47
<i>United States v. Burge</i> , 407 F.3d 1183 (11th Cir. 2005)	45
<i>United States v. Burgos</i> , 276 F.3d 1284 (11th Cir. 2001)	3, 52
<i>United States v. Bush</i> , 126 F.3d 1298 (11th Cir. 1997), <i>cert. denied</i> , 522 U.S. 1141 (1998)	14
<i>United States v. Camacho-Iraquen</i> , 2005 WL 1297236 (11th Cir. 2005)	22
<i>United States v. Cannon</i> , 41 F.3d 1462 (11th Cir.), <i>cert. denied</i> , 516 U.S. 823 (1995)	1
<i>United States v. Caro</i> , 309 F.3d 1348 (11th Cir. 2002)	16
<i>United States v. Chastain</i> , 198 F.3d 1338 (11th Cir. 1999), <i>cert. denied</i> , 532 U.S. 996 (2001)	10, 34
<i>United States v. Chavarriya-Mejia</i> , 367 F.3d 1249 (11th Cir.), <i>cert. denied</i> , 125 S. Ct. 95 (2004)	23
<i>United States v. Christopher</i> , 239 F.3d 1191 (11th Cir.), <i>cert. denied</i> , 534 U.S. 877 (2001)	23
<i>United States v. Clark</i> , 274 F.3d 1325 (11th Cir. 2001)	51
<i>United States v. Clavijo</i> , 165 F.3d 1341 (11th Cir. 1999)	48
<i>United States v. Cobia</i> , 41 F.3d 1473 (11th Cir.), <i>cert. denied</i> , 514 U.S. 1121 (1995)	45
<i>United States v. Coeur</i> , 196 F.3d 1344 (11th Cir. 1999)	40
<i>United States v. Cook</i> , 181 F.3d 1232 (11th Cir. 1999)	37
<i>United States v. Cook</i> , 291 F.3d 1297 (11th Cir. 2002)	57
<i>United States v. Cooper</i> , 203 F.3d 1279 (11th Cir. 2000)	10, 40
<i>United States v. Cover</i> , 199 F.3d 1270 (11th Cir. 2000), <i>cert. denied</i> , 541 U.S. 1081 (2004)	7
<i>United States v. Crawford</i> , 407 F.3d 1174 (11th Cir. 2005)	14, 52, 63
<i>United States v. Curtis</i> , 400 F.3d 1334 (11th Cir. 2005)	59
<i>United States v. Daniels</i> , 148 F.3d 1260 (11th Cir. 1998)	14
<i>United States v. Davis</i> , 329 F.3d 1250 (11th Cir.), <i>cert. denied</i> , 540 U.S. 925 (2003)	51

<i>United States v. De LaMata</i> , 266 F.3d 1275 (11th Cir. 2001), <i>cert. denied</i> , 535 U.S. 989 (2002)	27
<i>United States v. Diaz</i> , 248 F.3d 1065 (11th Cir. 2001)	22
<i>United States v. Diaz</i> , 26 F.3d 1533 (11th Cir. 1994), <i>cert. denied</i> , 513 U.S. 1155 (1995)	58
<i>United States v. Dixon</i> , 71 F.3d 380 (11th Cir. 1995)	42
<i>United States v. Dockery</i> , 401 F.3d 1261 (11th Cir. 2005)	61
<i>United States v. Dodds</i> , 347 F.3d 893 (11th Cir. 2003)	16
<i>United States v. Dowling</i> , 403 F.3d 1242 (11th Cir. 2005)	60
<i>United States v. Drummond</i> , 240 F.3d 1333 (11th Cir. 2001)	23
<i>United States v. Dudley</i> , 102 F.3d 1184 (11th Cir.), <i>cert. denied</i> , 520 U.S. 1203 (1997)	7
<i>United States v. Duncan</i> , 400 F.3d 1297 (11th Cir. 2005)	60
<i>United States v. Dunlap</i> , 279 F.3d 965 (11th Cir. 2002)	2
<i>United States v. Duty</i> , 302 F.3d 1240 (11th Cir. 2002)	43
<i>United States v. Eggersdorf</i> , 126 F.3d 1318 (11th Cir. 1997), <i>cert. denied</i> , 523 U.S. 1013 (1998)	10
<i>United States v. Exarhos</i> , 135 F.3d 723 (11th Cir. 1998), <i>cert. denied</i> , 526 U.S. 1029 (1999)	35
<i>United States v. Farese</i> , 248 F.3d 1056 (11th Cir. 2001)	1
<i>United States v. Fernandez</i> , 234 F.3d 1345 (11th Cir. 2000), <i>cert. denied</i> , 532 U.S. 988 (2001)	19
<i>United States v. Ferreira</i> , 275 F.3d 1020 (11th Cir. 2001), <i>cert. denied</i> , 535 U.S. 1028 (2002)	5
<i>United States v. Figueroa</i> , 199 F.3d 1281 (11th Cir. 2000)	48
<i>United States v. Foster</i> , 155 F.3d 1329 (11th Cir. 1998)	35
<i>United States v. Frasier</i> , 381 F.3d 1097 (11th Cir. 2004)	36
<i>United States v. Fuentes</i> , 107 F.3d 1515 (11th Cir. 1997)	50
<i>United States v. Fuentes-Rivera</i> , 323 F.3d 869 (11th Cir.), <i>cert. denied</i> , 540 U.S. 856 (2003)	23
<i>United States v. Garcia</i> , 208 F.3d 1258 (11th Cir. 2000)	36, 39
<i>United States v. Garcia</i> , 405 F.3d 1260 (11th Cir. 2005)	48, 61
<i>United States v. Garrison</i> , 133 F.3d 831 (11th Cir. 1998)	32
<i>United States v. Gass</i> , 109 F.3d 677 (11th Cir. 1997)	41
<i>United States v. Gay</i> , 251 F.3d 950 (11th Cir. 2001)	44
<i>United States v. Gilbert</i> , 138 F.3d 1371 (11th Cir. 1998), <i>cert. denied</i> , 526 U.S. 1111 (1999)	44
<i>United States v. Giordano</i> , 261 F.3d 1134 (11th Cir. 2001)	27

	<u>Page</u>
<i>United States v. Giraldo-Prado</i> , 150 F.3d 1328 (11th Cir. 1998)	49
<i>United States v. Glover</i> , 179 F.3d 1300 (11th Cir. 1999), <i>cert. denied</i> , 533 U.S. 936 (2001)	30
<i>United States v. Goldberg</i> , 60 F.3d 1536 (11th Cir. 1995)	14
<i>United States v. Gonsalves</i> , 121 F.3d 1416 (11th Cir. 1997), <i>cert. denied</i> , 522 U.S. 1067 (1998)	44
<i>United States v. Gray</i> , 367 F.3d 1263 (11th Cir. 2004)	41
<i>United States v. Gunn</i> , 369 F.3d 1229 (11th Cir.), <i>cert. denied</i> , 125 S. Ct. 324 (2004)	45
<i>United States v. Guzman-Bera</i> , 216 F.3d 1019 (11th Cir. 2000)	24
<i>United States v. Hall</i> , 312 F.3d 1250 (11th Cir. 2002), <i>cert. denied</i> , 538 U.S. 954 (2003)	17
<i>United States v. Hall</i> , 349 F.3d 1320 (11th Cir. 2003)	32
<i>United States v. Harness</i> , 180 F.3d 1232 (11th Cir. 1999)	33
<i>United States v. Harper</i> , 218 F.3d 1285 (11th Cir. 2000)	17
<i>United States v. Harris</i> , 244 F.3d 828 (11th Cir. 2001), <i>cert. denied</i> , 534 U.S. 1105 (2002) ...	2
<i>United States v. Hernandez</i> , 160 F.3d 661 (11th Cir. 1998)	42
<i>United States v. Hernandez-Martinez</i> , 382 F.3d 1304 (11th Cir. 2004)	41
<i>United States v. Hersh</i> , 297 F. 3d 1233 (11th Cir. 2002), <i>cert. denied</i> , 537 U.S. 1217 (2003)	38
<i>United States v. Hidalgo</i> , 197 F.3d 1108 (11th Cir. 1999), <i>cert. denied</i> , 530 U.S. 1244 (2000)	30
<i>United States v. Hoffer</i> , 129 F.3d 1196 (11th Cir. 1997)	53
<i>United States v. Holland</i> , 22 F.3d 1040 (11th Cir. 1994), <i>cert. denied</i> , 513 U.S. 1109 (1995)	53
<i>United States v. Hunerlach</i> , 197 F.3d 1059 (11th Cir. 1999)	28
<i>United States v. Hunerlach</i> , 258 F.3d 1282 (11th Cir. 2001)	43
<i>United States v. Hunter</i> , 323 F.3d 1314 (11th Cir. 2003)	2
<i>United States v. Hurtado-Gonzalez</i> , 74 F.3d 1147 (11th Cir.), <i>cert. denied</i> , 517 U.S. 1250 (1996)	57
<i>United States v. Jackson</i> , 199 F.3d 1279 (11th Cir.), <i>cert. denied</i> , 529 U.S. 1120 (2000)	44
<i>United States v. Jackson</i> , 276 F.3d 1231 (11th Cir. 2001)	1, 19
<i>United States v. Jamieson</i> , 202 F.3d 1293 (11th Cir. 2000)	20
<i>United States v. Jeter</i> , 329 F.3d 1229 (11th Cir. 2003)	44
<i>United States v. Jiminez</i> , 224 F.3d 1243 (11th Cir. 2000), <i>cert. denied</i> , 534 U.S. 1043 (2001)	30
<i>United States v. Johnson</i> , 375 F.3d 1300 (11th Cir. 2004)	49
<i>United States v. Jones</i> , 143 F.3d 1417 (11th Cir. 1998)	58

	<u>Page</u>
<i>United States v. Jones</i> , 289 F.3d 1260 (11th Cir.), <i>cert. denied</i> , 537 U.S. 1049 (2002)	43
<i>United States v. Kapelushnik</i> , 306 F.3d 1090 (11th Cir. 2002)	53
<i>United States v. Kimball</i> , 291 F.3d 726 (11th Cir. 2002)	26
<i>United States v. Kuku</i> , 129 F.3d 1435 (11th Cir. 1997), <i>cert. denied</i> , 524 U.S. 909 (1998)	25
<i>United States v. Laihben</i> , 167 F.3d 1364 (11th Cir.), <i>cert. denied</i> , 527 U.S. 1029 (1999)	20
<i>United States v. Lebovitz</i> , 401 F.3d 1263 (11th Cir. 2005)	4, 17
<i>United States v. Linville</i> , 228 F.3d 1330 (11th Cir. 2000), <i>cert. denied</i> , 532 U.S. 996 (2001) . .	33
<i>United States v. Liss</i> , 265 F.3d 1220 (11th Cir. 2001)	9, 33
<i>United States v. Logal</i> , 106 F.3d 1547 (11th Cir.), <i>cert. denied</i> , 522 U.S. 953 (1997)	3, 50
<i>United States v. Long</i> , 122 F.3d 1360 (11th Cir. 1997)	33
<i>United States v. Lowery</i> , 166 F.3d 1119 (11th Cir.), <i>cert. denied</i> , 528 U.S. 889 (1999)	58
<i>United States v. Lozano</i> , 138 F.3d 915 (11th Cir. 1998)	24
<i>United States v. Maldonado-Ramirez</i> , 216 F.3d 940 (11th Cir. 2000), <i>cert. denied</i> , 531 U.S. 1114 (2001)	24, 57
<i>United States v. Malone</i> , 78 F.3d 518 (11th Cir. 1996)	29
<i>United States v. Mathenia</i> , 2005 WL 1201455 (11th Cir. 2005)	62
<i>United States v. Maung</i> , 267 F.3d 1113 (11th Cir. 2001)	9
<i>United States v. McArthur</i> , 108 F.3d 1350 (11th Cir. 1997)	50
<i>United States v. McClain</i> , 252 F.3d 1279 (11th Cir. 2001)	35
<i>United States v. Mellerson</i> , 145 F.3d 1255 (11th Cir. 1998)	43, 46
<i>United States v. Mesa</i> , 247 F.3d 1165 (11th Cir.), <i>cert. denied</i> , 534 U.S. 912 (2001)	30
<i>United States v. Miller</i> , 146 F.3d 1281 (11th Cir. 1998), <i>cert. denied</i> , 525 U.S. 1127 (1999) . .	56
<i>United States v. Miller</i> , 206 F.3d 1051 (11th Cir. 2000)	7
<i>United States v. Miller</i> , 71 F.3d 813 (11th Cir.), <i>cert. denied</i> , 519 U.S. 842 (1996)	54
<i>United States v. Miller</i> , 78 F.3d 507 (11th Cir. 1996)	53
<i>United States v. Morris</i> , 286 F.3d 1291 (11th Cir. 2002)	34
<i>United States v. Mueller</i> , 74 F.3d 1152 (11th Cir. 1996)	50
<i>United States v. Mullens</i> , 65 F.3d 1560 (11th Cir. 1995), <i>cert. denied</i> , 517 U.S. 1112 (1996)	28
<i>United States v. Murphy</i> , 306 F.3d 1087 (11th Cir. 2002)	8
<i>United States v. Murrell</i> , 368 F.3d 1283 (11th Cir.), <i>cert. denied</i> , 125 S. Ct. 439 (2004)	15
<i>United States v. Naves</i> , 252 F.3d 1166 (11th Cir.), <i>reh'g en banc denied</i> , 273 F.3d 395 (2001)	8
<i>United States v. Nealy</i> , 232 F.3d 825 (11th Cir. 2000), <i>cert. denied</i> , 534 U.S. 1023 (2001)	52
<i>United States v. Nguyen</i> , 255 F.3d 1335 (11th Cir.), <i>cert. denied</i> , 534 U.S. 1032 (2001)	1, 4

	<u>Page</u>
<i>United States v. Njau</i> , 386 F.3d 1039 (11th Cir. 2005)	34
<i>United States v. Novaton</i> , 271 F.3d 968 (11th Cir. 2001), <i>cert. denied</i> , 535 U.S. 1120 (2002)	2, 11
<i>United States v. Okoko</i> , 365 F.3d 962 (11th Cir. 2004)	49
<i>United States v. Orduno-Mireles</i> , 405 F.3d 960 (11th Cir. 2005)	24, 63
<i>United States v. Orozco</i> , 121 F.3d 628 (11th Cir. 1997)	49
<i>United States v. Padilla-Reyes</i> , 247 F.3d 1158 (11th Cir.), <i>cert. denied</i> , 534 U.S. 913 (2001)	24
<i>United States v. Paz</i> , 405 F.3d 946 (11th Cir. 2005)	61
<i>United States v. Perez</i> , 366 F.3d 1178 (11th Cir. 2004)	26
<i>United States v. Phillips</i> , 287 F.3d 1053 (11th Cir. 2002)	29
<i>United States v. Pielago</i> , 135 F.3d 703 (11th Cir. 1998)	41
<i>United States v. Pipkins</i> , 378 F.3d 1281 (11th Cir. 2004), <i>vacated at</i> 125 S. Ct. 1617 (2005), <i>opinion reinstated</i> , 2005 WL 1421449 (11th Cir. 2005)	15
<i>United States v. Polar</i> , 369 F.3d 1248 (11th Cir. 2004)	25
<i>United States v. Price</i> , 65 F.3d 903 (11th Cir. 1995), <i>cert. denied</i> , 518 U.S. 1017 (1996)	51
<i>United States v. Probel</i> , 214 F.3d 1285 (11th Cir.), <i>cert. denied</i> , 531 U.S. 939 (2000)	17
<i>United States v. Puche</i> , 350 F.3d 1137 (11th Cir. 2003)	28
<i>United States v. Quinn</i> , 123 F.3d 1415 (11th Cir. 1997), <i>cert. denied</i> , 523 U.S. 1012 (1998)	11
<i>United States v. Ramsdale</i> , 61 F.3d 825 (11th Cir. 1995), <i>cert. denied</i> , 528 U.S. 1178 (2000)	11
<i>United States v. Regueiro</i> , 240 F.3d 1321 (11th Cir. 2001)	56
<i>United States v. Reid</i> , 139 F.3d 1367 (11th Cir. 1998)	11
<i>United States v. Rendon</i> , 354 F.3d 1320 (11th Cir. 2003), <i>cert. denied</i> , 541 U.S. 1035 (2004)	11
<i>United States v. Rhind</i> , 289 F.3d 690 (11th Cir. 2002), <i>cert. denied</i> , 537 U.S. 1114 (2003)	20
<i>United States v. Rodriguez</i> , 279 F.3d 947 (11th Cir. 2002)	12
<i>United States v. Rodriguez-DeVaron</i> , 175 F.3d 930 (11th Cir.) (<i>en banc</i>), <i>cert. denied</i> , 528 U.S. 976 (1999)	31
<i>United States v. Rojas</i> , 47 F.3d 1078 (11th Cir. 1995)	56
<i>United States v. Romeo</i> , 122 F.3d 941 (11th Cir. 1997)	49
<i>United States v. Root</i> , 296 F.3d 1222 (11th Cir. 2002), <i>cert. denied</i> , 537 U.S. 1176 (2003)	5

	<u>Page</u>
<i>United States v. Rubbo</i> , 396 F.3d 1330 (11th Cir. 2005)	62
<i>United States v. Rucker</i> , 171 F.3d 1359 (11th Cir.), <i>cert. denied</i> , 528 U.S. 976 (1999)	46
<i>United States v. Ryan</i> , 289 F.3d 1339 (11th Cir.), <i>cert. denied</i> , 537 U.S. 927 (2002)	12
<i>United States v. Saavedra</i> , 148 F.3d 1311 (11th Cir. 1998)	13
<i>United States v. Sanchez</i> , 269 F.3d 1250 (11th Cir. 2001), (<i>en banc</i>), <i>cert. denied</i> , 535 U.S. 942 (2002)	2
<i>United States v. Saucedo-Patino</i> , 358 F.3d 790 (11th Cir. 2004)	54
<i>United States v. Schlei</i> , 122 F.3d 944 (11th Cir. 1997), <i>cert. denied</i> , 523 U.S. 1077 (1998)	14
<i>United States v. Searcy</i> , 132 F.3d 1421 (11th Cir. 1998)	54
<i>United States v. Shazier</i> , 179 F.3d 1317 (11th Cir. 1999)	41
<i>United States v. Shelton</i> , 400 F.3d 1325 (11th Cir. 2005)	60
<i>United States v. Shields</i> , 87 F.3d 1194 (11th Cir. 1996)(<i>en banc</i>)	12
<i>United States v. Simmons</i> , 338 F.3d 1335 (11th Cir.), <i>cert. denied</i> , 540 U.S. 1107 (2004)	20
<i>United States v. Singh</i> , 291 F.3d 756 (11th Cir. 2002)	36, 39
<i>United States v. Smith</i> , 127 F.3d 987 (11th Cir. 1997), <i>cert. denied</i> , 523 U.S. 1011 (1998)	13, 39
<i>United States v. Smith</i> , 231 F.3d 800 (11th Cir. 2000), <i>cert. denied</i> , 532 U.S. 1019 (2001)	34, 37
<i>United States v. Smith</i> , 289 F.3d 696 (11th Cir. 2002)	43, 45, 55, 57
<i>United States v. Starks</i> , 157 F.3d 833 (11th Cir. 1998)	39
<i>United States v. Stevenson</i> , 68 F.3d 1292 (11th Cir. 1995)	15
<i>United States v. Stuart</i> , 384 F.3d 1243 (11th Cir. 2004)	55
<i>United States v. Suarez</i> , 313 F.3d 1287 (11th Cir. 2002), <i>cert. denied</i> , 538 U.S. 968, 540 U.S. 828 (2003)	3, 31
<i>United States v. Summers</i> , 176 F.3d 1328 (11th Cir. 1999)	8
<i>United States v. Thomas</i> , 242 F.3d 1028 (11th Cir.), <i>cert. denied</i> , 533 U.S. 960 (2001)	39
<i>United States v. Thomas</i> , 62 F.3d 1332 (11th Cir. 1995), <i>cert. denied</i> , 516 U.S. 1166 (1996)	29, 55
<i>United States v. Timmons</i> , 283 F.3d 1246 (11th Cir.), <i>cert. denied</i> , 537 U.S. 1004 (2002)	13
<i>United States v. Tomono</i> , 143 F.3d 1401 (11th Cir. 1998)	55
<i>United States v. Torrealba</i> , 339 F.3d 1238 (11th Cir. 2003), <i>cert. denied</i> , 540 U.S. 1207 (2004)	5, 38
<i>United States v. Uscinski</i> , 369 F.3d 1243 (11th Cir. 2004)	37
<i>United States v. Vallejo</i> , 297 F.3d 1154 (11th Cir.), <i>cert. denied</i> , 537 U.S. 1096 (2002)	9
<i>United States v. Vazquez</i> , 53 F.3d 1216 (11th Cir. 1995)	4

	<u>Page</u>
<i>United States v. Vega</i> , 392 F.3d 1281 (11th Cir. 2004)	20
<i>United States v. Verbitskaya</i> , 406 F.3d 1324 (11th Cir. 2005)	5
<i>United States v. Vincent</i> , 121 F.3d 1451 (11th Cir. 1997)	8
<i>United States v. Ward</i> , 222 F.3d 909 (11th Cir. 2000)	34
<i>United States v. Webb</i> , 139 F.3d 1390 (11th Cir. 1998)	45
<i>United States v. White</i> , 118 F.3d 739 (11th Cir. 1997)	59
<i>United States v. White</i> , 335 F.3d 1314 (11th Cir. 2003)	42
<i>United States v. Whitesell</i> , 314 F.3d 1251 (11th Cir. 2002), <i>cert. denied</i> , 539 U.S. 951 (2003)	18
<i>United States v. Williams</i> , 59 F.3d 1180 (11th Cir. 1995), <i>cert. denied</i> , 517 U.S. 1157 (1996)	18
<i>United States v. Willis</i> , 139 F.3d 811 (11th Cir. 1998)	55
<i>United States v. Wilson</i> , 392 F.3d 1243 (11th Cir. 2004)	37
<i>United States v. Wimbush</i> , 103 F.3d 968 (11th Cir. 1996), <i>cert. denied</i> , 520 U.S. 1247 (1997)	21
<i>United States v. Wooden</i> , 169 F.3d 674 (11th Cir. 1999)	8
<i>United States v. Zapata</i> , 139 F.3d 1355 (11th Cir. 1998)	13
<i>United States v. Zlatogur</i> , 271 F.3d 1025 (11th Cir.), <i>cert. denied</i> , 535 U.S. 946 (2002)	37
<i>Williams v. United States</i> , 396 F.3d 1340 (11th Cir. 2005)	62

U.S. SENTENCING COMMISSION GUIDELINES MANUAL

CASE ANNOTATIONS — ELEVENTH CIRCUIT

CHAPTER ONE: *Authority and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001). Contrary to the defendant's double-counting argument, separate guideline sections apply cumulatively, unless the guidelines specifically direct otherwise, pursuant to Application Note 4 to §1B1.1.

United States v. Nguyen, 255 F.3d 1335 (11th Cir.), *cert. denied*, 534 U.S. 1032 (2001). Pursuant to §1B1.1(a), (b), and (d), in sentencing a defendant convicted of a racketeering conspiracy based on a predicate act of murder, the guidelines require the district court first to depart downward for lack of intent, then to apply the grouping rules to enhance the offense level, rather than applying the grouping rules to the original offense level and afterward making a downward departure.

§1B1.2 Applicable Guidelines

United States v. Farese, 248 F.3d 1056 (11th Cir. 2001). Pursuant to §1B1.2(d) and *United States v. Ross*, 131 F.3d 970 (11th Cir. 1997), the sentence for a conspiracy conviction must be based on the object of the conspiracy (*i.e.*, money laundering) that can be proven beyond a reasonable doubt. Thus, if the guilty plea conviction does not establish the object of the conspiracy beyond a reasonable doubt, the matter must be remanded for the district court to make this determination.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004), *vacated at* 125 S. Ct. 1044 (2005), *opinion reinstated*, 2005 WL 1052236 (11th Cir. 2005). The defendant contended that certain extrinsic activities were not relevant conduct because the events were too remote in time from the offense of conviction and were not part of a common scheme or plan with the offense of conviction. All of the offenses involved methamphetamine. The defendant's role in each was to locate a supplier for anhydrous ammonia and to cook the methamphetamine. The offenses occurred within four or five months of one another. The court held that the consistency in the type of drug, the defendant's role in the offenses, and the proximity of the offenses supported the conclusion that the offenses were part of the same conduct.

United States v. Cannon, 41 F.3d 1462 (11th Cir.), *cert. denied*, 516 U.S. 823 (1995). The court held that acquitted conduct may be considered by a sentencing court in determining a defendant's sentence because "a verdict of acquittal demonstrates a lack of proof sufficient to

meet a beyond-a-reasonable-doubt standard"—a standard of proof higher than the preponderance of the evidence standard required for consideration of relevant conduct at sentencing.

United States v. Dunlap, 279 F.3d 965 (11th Cir. 2002). The defendant challenged a four-level enhancement under §2G2.2(b)(3). The district court applied the enhancement because the defendant possessed sadistic images and he transmitted different child pornography for which he was convicted. Although the sadistic images were not transmitted, the four-level enhancement would apply pursuant to §1B1.3(a)(1), which provides, "Relevant conduct" includes "all acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction . . .," as long as he possessed the sadistic images at the same time he transmitted the other child pornography.

United States v. Harris, 244 F.3d 828 (11th Cir. 2001), *cert. denied*, 534 U.S. 1105 (2002). The defendant pled guilty to two counts of drug trafficking in violation of 21 U.S.C. § 841. With a calculated drug quantity of 17.8 grams, the defendant's base offense level was 12. The presentence report was prepared based on the total amount of drugs attributable to the defendant through all the transactions alleged in the indictment which resulted in a base offense level of 32. The district court ruled that *Apprendi* prohibited consideration of drug quantities beyond those involved in the offense of conviction. On appeal, the defendant argued that *Apprendi* applied to the relevant conduct provision of the guidelines. The Eleventh Circuit held that the relevant conduct provision did not violate *Apprendi* in this case because the relevant conduct calculations resulted in an increased sentencing guidelines range that fell within the defendant's statutory maximum.

United States v. Hunter, 323 F.3d 1314 (11th Cir. 2003). The defendants participated in a counterfeit corporate check cashing ring that operated over three and a half years. The district court held each defendant responsible to the entire amount of loss under §1B1.3(a)(1)(B). On appeal, each defendant argued that the district court erred in attributing the entire amount of loss to him or her. The Eleventh Circuit held that the defendant's knowledge about the larger operation, and his agreement to perform a particular act, does not amount to acquiescence to the conduct involved in the criminal enterprise as a whole. The court concluded that the district court erred in determining the defendants' relevant conduct because it did not make particularized findings regarding the scope of each defendant's agreement.

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001), *cert. denied*, 535 U.S. 1120 (2002). Pursuant to §1B1.3(a)(1)(b), as clarified in *United States v. Gallo*, 195 F.3d 1278 (11th Cir. 1999), to apply a (gun possession) sentence enhancement based upon co-conspirator conduct, the co-conspirator's conduct (possessing a gun) must be reasonably foreseeable by the defendant.

United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001), (*en banc*), *cert. denied*, 535 U.S. 942 (2002). *Apprendi* is implicated only when a judge-decided fact actually increases a defendant's sentence beyond the prescribed statutory maximum penalty for the crime of conviction and has no application to, or effect on, cases where a defendant's sentence falls at or below that maximum penalty.

United States v. Suarez, 313 F.3d 1287 (11th Cir. 2002), *cert. denied*, 538 U.S. 968, 540 U.S. 828 (2003). Application of a two-level enhancement for possession of a firearm by a co-conspirator under §2D1.1(b)(1) was proper as it was reasonably foreseeable for relevant conduct purposes under §1B1.3(a)(1)(B).

§1B1.4 Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001). Section 1B1.4 is limited by 18 U.S.C. § 3553(a), and thus it is improper to sentence a defendant, in this case for refusing to cooperate, in order to accomplish a purpose not delineated in § 3553(a).

§1B1.10 Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

United States v. Armstrong, 347 F.3d 905 (11th Cir. 2003). The district court denied the defendant's request for a reduction of his sentence through the retroactive application of Amendments 599, 600, and 635. The Eleventh Circuit noted that Amendment 600 was not listed under §1B1.10(c), and, therefore, could not be retroactively applied. The court then noted that although Amendment 599 was listed under §1B1.10(c) and it qualified as an amendment for reduction purposes, it did not apply factually in the defendant's case. Finally, the court held that consideration of Amendment 635 as a clarifying amendment claimed in § 3582(c)(2) motions can only be applied retroactively if expressly listed under §1B1.10(c). Furthermore, the court held that "clarifying amendments" were no exception to this rule and may only be retroactively applied on direct appeal of a sentence or under a section 2255 motion. Amendment 635 was not listed under §1B1.10(c). Accordingly, the court affirmed the district court.

United States v. Brown, 104 F.3d 1254 (11th Cir. 1997). In a case of first impression in the Eleventh Circuit, the court held that, in declining to apply retroactively an amendment to sentencing guidelines that would have lowered a defendant's offense level for drug-related convictions, a federal district court was not required to present particularized findings on each individual factor listed in the statute governing resentencing. The court clearly considered those factors and set forth adequate reasons for refusing to reduce the sentence, including findings that the defendant's involvement in a crack cocaine conspiracy was significant, that he had lacked a legitimate job for nearly two years as he participated in the conspiracy, and that he failed to show remorse or acceptance of responsibility.

United States v. Logal, 106 F.3d 1547 (11th Cir.), *cert. denied*, 522 U.S. 953 (1997). The district court did not violate the *Ex Post Facto* Clause by looking to a sentencing guideline amendment, adopted after the completion of defendant's offense, for guidance in determining the extent of his upward sentencing departure. The circuit court joined the majority of circuits in holding that the judge may consider guideline amendments that post-date the applicable guidelines in determining the degree of departure, provided that he considered the appropriate guideline in setting the base offense level.

United States v. Vazquez, 53 F.3d 1216 (11th Cir. 1995). The defendant was convicted of structuring financial transactions and conspiracy to structure financial transactions. On appeal, the defendant argued that he was eligible to be resentenced according to the amended version of §2S1.3 which provides a lesser base offense level. The court held that the district court, not the appellate court, should be the initial forum to exercise the discretion concerning whether or not an adjustment is warranted in light of an ameliorative amendment.

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997). The district court erred in sentencing the defendant under the *Guidelines Manual* in effect at the time he committed the majority of his crimes. Bailey had fair notice that continuing his crimes in operating his firearms business subjected him to the amended sentencing guidelines in effect when he committed the last of the crimes for which he was convicted. The circuit court remanded for resentencing under the version of *Guidelines Manual* in effect when defendant committed last crime for which he was convicted.

CHAPTER TWO: Offense Conduct

Part A Offenses Against the Person

§2A1.1 First Degree Murder

United States v. Nguyen, 255 F.3d 1335 (11th Cir.), *cert. denied*, 534 U.S. 1032 (2001). Pursuant to Application Note 1 to §2A1.1, the district court lawfully departed downward where the defendant did not cause death intentionally or knowingly.

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

United States v. Lebovitz, 401 F.3d 1263 (11th Cir. 2005). The defendant was convicted of traveling in interstate commerce with intent to have sex with a minor, and possessing child pornography obtained through interstate commerce. The district court ruled that §2A3.1 was the "most appropriate" guideline for the defendant's "offense conduct." The defendant asserted that this guideline should not apply because his victim was fictitious. The court held that whether a victim is fictitious is irrelevant to the application of a federal statute or sentencing guideline prohibiting sexual conduct with a minor because defendants who attempt to have sex with fictional victims should be treated no differently than those who prey on actual victims. Application of the provision turns simply on the illegal purpose for the defendant's interstate travel.

See United States v. Pipkins, 378 F.3d 1281 (11th Cir. 2004), *vacated at* 125 S. Ct. 1617 (2005), *opinion reinstated*, 2005 WL 1421449 (11th Cir. 2005), §2G1.1, p. 15.

§2A3.2 Criminal Sexual Abuse of a Minor Under the Age of Sixteen (Statutory Rape) or Attempt to Commit Such Acts

United States v. Root, 296 F.3d 1222 (11th Cir. 2002), *cert. denied*, 537 U.S. 1176 (2003). The defendant was convicted of attempting to persuade a minor to engage in criminal sexual activity and traveling in interstate commerce for the purpose of engaging in a criminal sexual act with a minor. The two-level enhancement under §2A3.2(b)(2)(B) for unduly influencing the victim to engage in prohibited sexual conduct was applied to the defendant who engaged in Internet chat room communications with an undercover law enforcement officer posing as a 13-year-old female. On appeal, the defendant challenged application of this enhancement by arguing that the victim was not a real person. The court noted that the Sentencing Commission specifically defined the term “victim” to include an undercover law enforcement officer as instructed in §2A3.2, Note 1. Further, the court interpreted the phrase “unduly influenced the victim” as focusing on the actions of the defendant, regardless of whether the victim was a real person or a hypothetical person.

United States v. Verbitskaya, 406 F.3d 1324 (11th Cir. 2005). The defendants were convicted of extortion charges and the district court applied an enhancement under §2B3.2(b)(3) because a firearm was “otherwise used.” The record contained evidence that the defendant grabbed a firearm from behind his back and told the extortion victim that if he did not send money to Switzerland, the defendant would shoot him. A police officer testified that on the night the victim reported the incident, the officer heard the crack of a gun while waiting outside the defendant’s condominium. The Eleventh Circuit found that the district court was within its discretion to find that the defendant used the firearm to make an explicit threat.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

United States v. Ferreira, 275 F.3d 1020 (11th Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002). A six-level enhancement pursuant to §2A4.1(b)(1) applies where a written ransom demand was drafted but never delivered because it was “reasonably certain” that ransom note would have been made but for the defendant’s apprehension. *See also United States v. Torrealba*, 339 F.3d 1238 (11th Cir. 2003), *cert. denied*, 540 U.S. 1207 (2004).

United States v. Torrealba, 339 F.3d 1238 (11th Cir. 2003), *cert. denied*, 540 U.S. 1207 (2004). The defendant was convicted of one count of conspiracy to commit hostage taking, one count of hostage taking, and one count for using and carrying a firearm during and in relation to a federal crime of violence. On appeal, the defendant argued that the victim had suffered only serious bodily injuries, and that a two-level enhancement would have been more appropriate. The Eleventh Circuit noted that the victim’s treating physician had stated that her facial symmetry would never be the same as it was prior to the attack, and that the nerve damage and scarring were likely permanent. The court concluded that, under these circumstances, the district court did not err in determining that the victim’s injuries were permanent or life-threatening, and that imposition of a four-level upward adjustment under §2A4.1(b)(2)(A) was appropriate.

§2A6.1 Threatening or Harassing Communications

United States v. Barbour, 70 F.3d 580 (11th Cir. 1995), *cert. denied*, 517 U.S. 1147 (1996). The defendant was convicted of threatening the President of the United States based on

statements he made to neighbors expressing his desire to kill the President. The defendant's sentence was enhanced under §2A6.1(b)(1) based on a week-long trip he took to Washington, D.C., ten days before his conversation with his neighbor, during which he went to the Mall everyday with the intent to shoot the President while the President was jogging. The defendant contended that an enhancement for this conduct was improper because the conduct occurred before the threatening communication was made. The circuit court held that pre-threat conduct may be used to support an enhancement under §2A6.1(b)(1). *See also United States v. Taylor*, 88 F.3d 938 (11th Cir. 1996) (same).

Part B Basic Economic Offenses

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

United States v. Auguste, 392 F.3d 1266 (11th Cir. 2004). The defendant was convicted of conspiracy to commit credit card fraud and credit card fraud, and she appealed from the sentence imposed. The district court added a two-level enhancement under §2B1.1(b)(9)(C)(I) because the defendant's offense involved “the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification.” The defendant claimed that §2B1.1(b)(9)(C)(I) should not apply because she used her own name on the credit cards and she used existing lines of credit rather than opening new ones. By getting her own name placed on the victims' accounts, however, the defendant used one means of identification (account numbers) to obtain another (credit cards). Regardless of whether the credit cards were used in conjunction with a new line of credit she established or an existing one that belonged to a victim, the defendant had no authority to obtain the credit cards. Accordingly, a two-level enhancement was appropriate under §2B1.1(b)(9)(C)(I).

§2B3.1 Robbery

United States v. Bates, 213 F.3d 1336 (11th Cir.), *cert. denied*, 531 U.S. 1056 (2000). The district court did not err in imposing sentencing enhancements under §2B3.1 for possession of a dangerous weapon and carjacking during the commission of the robbery. The defendant simulated possession of what appeared to be a dangerous weapon by reaching into his waistband. The victim teller perceived the defendant to be reaching for a weapon. Given these facts, the court upheld application of the weapon enhancement. The court also upheld the carjacking enhancement because the record established that the defendant demanded the victim's car keys, grabbed his arm, and forced him into the house, and thus met the requirements for the enhancement by using force and violence or intimidation.

United States v. Cover, 199 F.3d 1270 (11th Cir. 2000), *cert. denied*, 541 U.S. 1081 (2004). The defendant and co-conspirators, armed with firearms, committed a bank robbery and held 15 people captive. One co-conspirator escaped by carjacking and kidnapping a motorist. The defendant pled guilty to bank robbery and to using and carrying a firearm during a crime of

violence. Both the government and the defendant appealed the application of a sentence enhancement under §2B3.1(b)(2)(C) for brandishing, displaying or possessing a firearm. The Eleventh Circuit found that the district court erred by enhancing the defendant's sentence five levels under §2B3.1(b)(2)(C) because he was convicted under section 924(c), and the applicable sentencing provision (§2K2.4) specifies that any specific offense characteristic for the possession or use of a firearm is not to be applied in respect to the guideline for the underlying offense. The circuit court found the error was harmless, however, because an alternative ground existed for affirming the application of the §2B3.1(b)(2) enhancement. The court reversed the district court's application of the five-level enhancement under §2B3.1(b)(2)(C) and remanded for application of the six-level enhancement under §2B3.1(b)(2)(B) because the defendant and his co-conspirator held various persons in the bank at gunpoint, and the conduct constituted "otherwise using" a firearm. Further, the circuit court found that the district court properly applied enhancements under §2B3.1(b)(4)(A) and (b)(5) because it was reasonably foreseeable that the co-conspirator would escape by carjacking and kidnapping a motorist. Finally, the circuit court agreed with the application of an enhancement under §2B3.1(b)(7)(C) for the amount of money left in the bank vault. The commentary to §2B1.1 makes it clear that in a case of a partially completed offense, the offense level is to be determined under §2X1.1, under which a defendant will be held liable for the entire amount of money he attempted to seize, if the offense was interrupted by the intercession of law enforcement authorities. The defendant entered the bank vault area, was about to insert the key into the lock and enter the combination when someone alerted him to the presence of the police.

United States v. Dudley, 102 F.3d 1184 (11th Cir.), *cert. denied*, 520 U.S. 1203 (1997). On an issue of first impression, the Eleventh Circuit affirmed the district court's two-level enhancement under §2B3.1(b)(1) for property taken from a financial institution after the defendant's conviction for bank robbery. The court held that the Commission sought to punish robbery of financial institutions and post offices more severely because those entities kept large amounts of readily available cash and were attractive targets. The defendant failed to bear the burden of demonstrating that the guideline provision was irrational.

United States v. Miller, 206 F.3d 1051 (11th Cir. 2000). In an issue of first impression in the Eleventh Circuit, the court found that a four-level sentence enhancement pursuant to §2B3.1(b)(2)(D) could be applied for "otherwise us[ing]" an object which appeared to be a dangerous weapon during the commission of an attempted robbery. The defendant pled guilty to armed bank robbery during which he lit the fuse of a device that appeared to be, but was not in fact, a bomb, and otherwise threatened a bank teller. The circuit court found the term "otherwise used" means "the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." Because he did not just display or brandish the fake bomb but actually lit the fuse, explicitly threatening the teller, the court held the enhancement was properly applied.

United States v. Murphy, 306 F.3d 1087 (11th Cir. 2002). During an unarmed robbery in Georgia, the defendant handed to a bank teller a note stating "you have ten seconds to hand me all the money in your top drawer. I have a gun. Give me the note back now." The defendant had no gun nor did he make an express threat to shoot the teller. At sentencing, the district court

applied a two-level enhancement under §2B3.1(b)(2)(F) upon finding that the note constituted a “threat of death.” The Eleventh Circuit determined that the enhancement for “threat of death” was properly applied. Although the defendant did not make an “express” threat of death, the amended version of §2B3.1(b)(2)(F) did not require an “express” threat to be made.

United States v. Naves, 252 F.3d 1166 (11th Cir.), *reh'g en banc denied*, 273 F.3d 395 (2001). The district court did not engage in impermissible double counting in applying a two-level increase in the base offense level under the robbery guideline for a violation of the carjacking statute, 18 U.S.C. § 2119. The Eleventh Circuit disagreed with the defendant that the base offense level accounted for the level of culpability attributed to the offense of carjacking and that therefore adding two levels was double counting. The Commission intended to apply the two-level enhancement to the base robbery offense level of 22 for convictions under § 2119, and was, in effect, creating a higher base offense level of 22 for a conviction for carjacking.

United States v. Summers, 176 F.3d 1328 (11th Cir. 1999). The defendant was convicted of robbing a bank, during which he told a teller “I have a gun, give me \$500.” Prior to a 1997 amendment to §2B3.1(b)(2)(F), the robbery guideline provided a two-level enhancement when a robbery involved an express threat of death. The Eleventh Circuit followed a minority view that would not have deemed the defendant’s statement in this case to constitute an express threat of death. Subsequent to the defendant’s robbery, §2B3.1(b)(2)(F) was amended to delete the term “express” from the guideline. The court here concluded that this amendment represents a substantive change to the guidelines, rather than a clarification, and, therefore, may not be applied retroactively.

United States v. Vincent, 121 F.3d 1451 (11th Cir. 1997). The district court did not err in applying a three-level enhancement for possession of a dangerous weapon during a robbery, pursuant to §2B3.1(b)(2)(E), even though the victim could not see the weapon. The defendant placed an object against the restaurant manager’s side and demanded that she give him the money she was carrying. She believed it was some type of weapon that was used to perpetrate a robbery.

United States v. Wooden, 169 F.3d 674 (11th Cir. 1999). As a matter of first impression in the Eleventh Circuit, the court of appeals held that a defendant's holding a handgun about one-half inch from a robbery victim's forehead and pointing it at him constituted an "otherwise use" of the weapon, and not merely a "brandishing" thereof, warranting a six-level enhancement under §2B3.1(b)(2)(B).

§2B3.2 Extortion by Force or Threat of Injury or Serious Damage

United States v. Vallejo, 297 F.3d 1154 (11th Cir.), *cert. denied*, 537 U.S. 1096 (2002). In this case of first impression for the Eleventh Circuit, the defendants challenged the application of a two-level enhancement under §2B3.2(b)(5)(B) for “physical restraint” where the victims, during the robbery of a club, were initially grabbed and held against their will but eventually were free to leave. The defendants argued that the victims’ movements between the club and the restaurant next door demonstrated that they were not physically restrained as defined by the

guidelines. The court concluded that the victims in this case were physically restrained because they had no alternative but to comply, and were effectively prevented from leaving the club, even if only for a short time. The fact that the victims were eventually free to leave did not mean that they were not physically restrained.

§2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001). The defendants were convicted of defrauding Medicare through a referral-kickback scheme; thus, §2B4.1 determined the base offense level. The kickbacks included equipment and lease payments. The defense argued that because these payments were not received directly but instead went to a third party and because they were lawful remunerations, the payments could not count toward calculating the offense level. The only information supporting the calculations was in the PSR. In addition, the government relied on the language of the anti-kickback statute to support its argument that the defendant was liable for the full lease and equipment payments. The court ruled that although the district court did not clearly err by finding that the lease and equipment payments were in fact remuneration for referrals, it failed to make sufficient factual findings regarding the amount of loss. The case was remanded for further findings.

§2B6.1 Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

United States v. Maung, 267 F.3d 1113 (11th Cir. 2001). The defendant's base offense level was enhanced by two levels because the district court concluded that the defendant was in the business of receiving and selling stolen property. The defendant argued the enhancement did not apply because he did not personally receive or sell stolen property, but instead merely transported stolen vehicles on behalf of others. Based on the plain language of §2B6.1(b)(2), the appellate court ruled that the enhancement could not apply because the defendant was not literally in the business of "receiving and selling" stolen property. The court vacated the enhancement.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996). The district court did not err in setting the appellants' base offense levels under §2D1.1 based upon the total amount of marijuana seized during their arrests for conspiracy to manufacture and possess with intent to distribute marijuana plants, including amounts held for "personal use." The Eleventh Circuit held that where the evidence showed that the defendant was involved in a conspiracy to distribute drugs, the "defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy." Thus the marijuana intended for personal use by the defendants was properly included by the district court in determining their base offense levels.

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999), *cert. denied*, 532 U.S. 996 (2001). The district court improperly applied a two-level upward adjustment based on defendant's plan to use a private plane to import the narcotics where no importation actually occurred. The Eleventh Circuit found that the plain language of the guideline uses the past tense in stating "if the defendant unlawfully imported or exported a controlled substance . . . in which an aircraft carrier other than a regularly scheduled commercial air carrier was used" and clearly contemplates a completed event which did not occur in this case.

United States v. Cooper, 203 F.3d 1279 (11th Cir. 2000). The defendants were convicted of conspiracy to possess and distribute narcotics and possession of controlled substances with intent to distribute. The defendant was assessed a two-level enhancement for the possession of a firearm during a narcotics-related offense. He contested the enhancement, claiming that the government did not demonstrate the firearm found in the hotel room belonged to him or that it was connected to the underlying offense. The Eleventh Circuit stated to whom the firearm belonged was irrelevant because the defendant and his co-defendant had equal dominion over the hotel room where the gun was found. Further, the enhancement was properly applied because the guidelines state that it is to be applied if the weapon is present, unless it is clearly improbable the weapon was connected with the offense. The gun was found in the hotel room directly under packaged bricks of marijuana, suggesting an active connection with the narcotics enterprise. *See also United States v. Hall*, 46 F.3d 62 (11th Cir. 1995) (once the government has shown proximity of the firearm to the site of the charged offense, the evidentiary burden shifts to the defense to demonstrate that a connection between the weapons and the offense is clearly improbable).

United States v. Eggersdorf, 126 F.3d 1318 (11th Cir. 1997), *cert. denied*, 523 U.S. 1013 (1998). The district court did not err in denying the defendant's motion to reduce his sentence below the mandatory minimum. The circuit court held that the statute plainly stating that the five-year mandatory minimum sentence applied in cases involving 100 or more marijuana plants, regardless of weight, controlled over the amendment to the sentencing guideline to provide that each marijuana plant would be equivalent of 100 grams, instead of one kilogram, of marijuana.

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001), *cert. denied*, 535 U.S. 1120 (2002). The district court did not commit clear error by making a two-level enhancement, pursuant to §2D1.1(b)(1), to the drug defendant's sentence based upon possession of a firearm of a codefendant, who had provided protection for and escorted them while they were transporting drugs and drug proceeds. For the §2D1.1(b)(1) firearms enhancement for the co-conspirator's possession to apply, the government must prove by a preponderance of the evidence: (1) the possessor of the firearm was a co-conspirator, (b) the possession was in furtherance of the conspiracy, (c) the defendant was a member of the conspiracy at the time of possession, and (d) the co-conspirator's possession was reasonably foreseeable by the defendant.

United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997), *cert. denied*, 523 U.S. 1012 (1998). The district court did not err in calculating the defendant's base offense level according to the guideline for crack rather than for cocaine hydrochloride. The district court's finding that the purpose of the conspiracy was to cook crack was amply supported by the record. The conversion of powder cocaine into crack not only was foreseeable by defendant, but was plainly within the scope of the criminal activity that he undertook. There was evidence that defendant had discussed "cooking" the cocaine with the informant, and that a codefendant, in the defendant's presence, had told the informant that he was in the business of making crack and needed high quality cocaine for that job.

United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995), *cert. denied*, 528 U.S. 1178 (2000). The district court committed plain error when imposing a sentence based upon D-methamphetamine rather than L-methamphetamine when the court failed to make the requisite findings as to the type of methamphetamine used in the offense. Because D-methamphetamine requires a significantly harsher sentence under the guidelines than L-methamphetamine, the government bears the burden of production and persuasion as to the type of methamphetamine involved in the offense.

United States v. Reid, 139 F.3d 1367 (11th Cir. 1998). The district court's lack of findings on the record as to why it did not apply the two-level reduction directed by §2D1.1(b)(6) (applicable if the defendant meets the safety valve criteria) precluded meaningful appellate review. The evidence of record did not demonstrate that defendant did not qualify. The court of appeals vacated the sentence and remanded for further proceedings.

United States v. Rendon, 354 F.3d 1320 (11th Cir. 2003), *cert. denied*, 541 U.S. 1035 (2004). The appellate court affirmed the district court's application of a two-level captain enhancement under §2D1.1(b)(2)(B). A federal grand jury returned a two-count superseding indictment charging the four-man crew of a go-fast boat with conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine. The facts of the case evidenced that the defendant was the captain in an employment, navigational, and operational sense. The defendant identified himself as the captain to boarding Coast Guard personnel. Additionally, his codefendants testified that they considered him to be the captain because he not only navigated the boat directly or indirectly and was the only crew member who knew its course, but also he had hired the crew and directed their operations on board. The appellate court rejected the defendant's argument that the district court's application of both the captain

enhancement under §2D1.1(b)(2)(B) and the organizer/leader enhancement under §3B1.1 was improper double counting. The court stated that absent an instruction to the contrary, the adjustments from different guideline sections were applied cumulatively, and neither of the challenged guidelines included any language or commentary that suggested that they may not be applied cumulatively. Consequently, the district court did not err in concluding that the defendant qualified for enhancements under both §§2D1.1(b)(2)(B) and 3B1.1(a).

United States v. Rodriguez, 279 F.3d 947 (11th Cir. 2002). The defendant can be sentenced under §2D1.1(A)(2), based upon death or serious bodily injury resulting from drug use, without violating due process or *Apprendi*, because *Apprendi* does not affect the district court's determinations under the sentencing guidelines, as long as the defendant is sentenced within the statutory maximum. Furthermore, intervening acts of others who failed to immediately call for help when they discovered the victim unconscious were insufficient to relieve the defendant of liability for a drug overdose, even assuming *arguendo* that an intervening cause of death could foreclose application of the death or serious bodily injury enhancement. The court thus did not decide whether an intervening cause exception to the enhancement exists because the defendant did not adduce facts entitling him to the benefit of such an exception.

United States v. Ryan, 289 F.3d 1339 (11th Cir.), *cert. denied*, 537 U.S. 927 (2002). On appeal, the defendant claimed the district court erred by refusing to instruct the jury on sentencing entrapment and challenged his sentencing drug quantity because it included the claimed entrapment amount. The court rejected the defendant's claim for a sentencing entrapment instruction because there was not sufficient evidence of government inducement to require an instruction on sentencing entrapment. Furthermore, the court ruled, citing Application Note 12 to §2D1.1, that it was proper to base the drug quantity upon the drug amount that was agreed-upon to be sold.

United States v. Shields, 87 F.3d 1194 (11th Cir. 1996)(*en banc*). The Eleventh Circuit, sitting *en banc*, upheld the district court's opinion that a marijuana grower who is apprehended after his marijuana crop has been harvested should be sentenced according to the number of plants involved in the offense, as opposed to the weight of the marijuana. The circuit court noted that both the text of 18 U.S.C. § 841 and §2D1.1 contain the phrase "involve marijuana plants," but neither suggests that their application depends upon whether the marijuana plants are harvested before or after the growers are apprehended. The circuit court rejected defendant's argument that the district court should not have applied the equivalency provision of §2D1.1 because the dead plants were not "marijuana plants" within the meaning of the guidelines. An interpretation of §2D1.1 which depends upon the state of affairs discovered by law enforcement officers (*i.e.*, whether plants are live or have been harvested) contradicts the principle of relevant conduct. The circuit court stated that relevant conduct includes all acts and omissions committed by the defendant. If defendant's relevant conduct includes growing marijuana plants, the equivalency provision applies, and the offense level will be calculated using the number of plants.

United States v. Smith, 127 F.3d 1388 (11th Cir. 1997). The district court did not err in enhancing the defendant's base offense level for possession of a firearm in relation to a drug offense, even though he did not possess a firearm during the offense of conviction. The base offense level enhancement under the sentencing guidelines for possession of a firearm in relation to drug offense is authorized if the weapon was possessed during the offense of conviction or during the related relevant conduct.

United States v. Timmons, 283 F.3d 1246 (11th Cir.), *cert. denied*, 537 U.S. 1004 (2002). When a defendant is convicted of an 18 U.S.C. § 924(c) offense as well as an underlying drug offense, the district court is precluded from applying a weapons enhancement pursuant to §2D1.1(b)(1).

United States v. Zapata, 139 F.3d 1355 (11th Cir. 1998). The district court erred in "rounding up" its drug quantity calculations for purposes of determining the defendant's offense level. The amount of marijuana attributable to the defendant was 44 pounds, which the district court determined would yield a base offense level of 18 based on between 20 and 40 kilograms of marijuana. However, the 44 pounds of marijuana actually converted to 19.9584 kilograms of marijuana, resulting in a base offense level of 16. The plain meaning of the guideline directs a base offense level of 16. Although sentencing may be based on fair, accurate, and conservative estimates of drug quantities attributable to a defendant, it cannot be based on calculations of drug quantities that are merely speculative. Because the rounding up was not based on any legal or factual support, the sentence was vacated and remanded for resentencing.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998). The district court erred in applying §2D1.2 to the defendant's drug conviction because he was not charged with a violation of 21 U.S.C. § 860, selling drugs near a school. Section 2D1.2 establishes base offense levels for violations of 21 U.S.C. § 860. The court of appeals held that section 860 is a substantive criminal offense that must be charged, not a mere sentence enhancer for certain classes of more general drug offenses. The defendant's uncharged but relevant conduct is irrelevant to determining which guideline is applicable to an offense; relevant conduct is properly considered only after the applicable guideline is selected, when the court is analyzing the various sentencing considerations within the guideline chosen. Thus, the defendant's actual conduct was not the proper basis for applying §2D1.2, and the court should have applied §2D1.1, which establishes the base offense level for 21 U.S.C. § 841(a), the statute under which the defendant was convicted.

Part F Offenses Involving Fraud and Deceit [Deleted]

§2F1.1 Fraud and Deceit [Deleted]

United States v. Bald, 132 F.3d 1414 (11th Cir. 1998). The district court properly included as actual loss all credit card charges made by defendants, including unauthorized purchases returned for credit before detection.

United States v. Bush, 126 F.3d 1298 (11th Cir. 1997), *cert. denied*, 522 U.S. 1141 (1998). The district court erred in failing to apply the enhancement for more than minimal planning where defendant embezzled funds through several fraudulent loans. The district court also erred in departing downward on the basis of “single act of aberrant behavior.” The defendant’s conduct was clearly not a single, “spontaneous and thoughtless act[,] rather than one which was the result of substantial planning.” Whether “society has an interest” in incarcerating a particular defendant is a matter addressed by the guidelines generally, and is irrelevant to the question whether a particular defendant’s conduct was in fact “aberrant” within the meaning of Chapter One, Part A.

United States v. Crawford, 407 F.3d 1174 (11th Cir. 2005). The district court clearly erred when it determined that the defendant did not engage in more than minimal planning. The defendant engaged in over 100 transactions with the co-participant, in which he acquired fraudulently obtained food stamp vouchers worth over \$400,000. The scheme lasted over five years.

United States v. Daniels, 148 F.3d 1260 (11th Cir. 1998). The district court did not err by refusing to exclude from the loss calculations \$81,250 paid to the victim by the defendant’s errors and omissions insurer. The court of appeals noted that the partial reimbursement did not change the amount the defendant embezzled, but only substituted his insurance company as another victim.

United States v. Goldberg, 60 F.3d 1536 (11th Cir. 1995). The district court erred in calculating loss pursuant to §2F1.1. The defendant was convicted of possession and interstate transportation of stolen securities, bank fraud and attempted escape. The defendant argued on appeal that he deserved an evidentiary hearing to determine the number of bonds attributable to him and their value. The defendant further argued that the stolen bonds were worthless on their face. The circuit court ruled that the district court erred in failing to hold an evidentiary hearing to determine the actual number of bonds for which the defendant was responsible, and the face value of the bonds. The circuit court further ruled that for sentencing purposes the face value of bonds provides a reasonable quantification of the risk to unsuspecting buyers or lenders.

United States v. Schlei, 122 F.3d 944 (11th Cir. 1997), *cert. denied*, 523 U.S. 1077 (1998). The district court did not err in considering intended loss in calculating the defendant’s offense level, even though the defendant was caught in a government sting operation.

United States v. Stevenson, 68 F.3d 1292 (11th Cir. 1995). In a matter of first impression, the Eleventh Circuit ruled "that the sentencing guidelines permit the cumulative enhancement of a sentence under the more than minimal planning provision of §2F1.1 and the aggravating role provision of §3B1.1. The Eleventh Circuit reasoned that neither the text nor the commentary of §2F1.1 or §3B1.1, suggests an intent to preclude the cumulative application of those sections. The circuit court also relied on a recent amendment to §1B1.1, stating that adjustments from guideline sections are to be applied cumulatively absent an instruction to the contrary to support its decision.

Part G Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity

§2G1.1 Promoting A Commercial Sexual Act or Prohibited Sexual Conduct with an Individual Other than a Minor

United States v. Murrell, 368 F.3d 1283 (11th Cir.), *cert. denied*, 125 S. Ct. 439 (2004). The defendant made a deal online with a purported father to have sex with his minor daughter. The father was actually an undercover agent. The district court applied sentencing enhancements under §2G1.1(b)(2)(B) for an offense involving a victim between the ages of 12 and 16 and under §2G1.1(b)(5) for using a computer to induce a minor to engage in a prohibited sex act. The Eleventh Circuit upheld both enhancements. Reasoning that the first is directed at the defendant's intent, rather than any harm to an actual victim, the court held that the enhancement applies whether the victim is real, fictitious or an undercover agent. The court also upheld the computer enhancement even though the defendant did not directly induce the minor. The enhancement applies when a defendant communicates with the parents of the minor using a computer.

United States v. Pipkins, 378 F.3d 1281 (11th Cir. 2004), *vacated at* 125 S. Ct. 1617 (2005), *opinion reinstated*, 2005 WL 1421449 (11th Cir. 2005). The defendants were convicted of conspiracy to violate the Racketeering Influenced Corrupt Organizations Act, and of violations of a host of other criminal statutes. The evidence at trial demonstrated that the defendants prostituted juvenile females, creating a system wherein the prostitutes were dominated by physical violence, among other things. When sentencing the defendants, the district court applied the §2G1.1(c)(2) cross reference, and used the guideline for criminal sexual abuse, §2A3.1 when sentencing the defendants. Challenging application of the cross reference on appeal, the defendants argued that the court should have applied the enhancement in §2G1.1(b)(1) for an offense involving prostitution, rather than the cross reference. Agreeing that the defendants' conduct does satisfy both the enhancement and the cross-reference, the court nonetheless affirmed the sentence. The court reasoned that some overlap in the enhancement and the cross-reference does not offend the sentencing guidelines or any other law and held that a district judge confronted with such an overlap is not free to choose between the enhancement and the cross-reference but must apply the cross-reference.

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

United States v. Bender, 290 F.3d 1279 (11th Cir.), *cert. denied*, 537 U.S. 1037 (2002). The defendant argued that the district court erred in applying §2G2.2 (trafficking), rather than §2G2.4 (possession), specifically contending that enhancement under §2G2.2 for sadistic material and distribution for gain did not apply because he merely possessed, as opposed to distributed, child pornography. Because the defendant received and transmitted child pornography via computer, the court held that §2G2.2 was properly applied. Moreover, the district court correctly applied a four-level enhancement under §2G2.2(b)(3) based upon pornographic materials that portrayed sadistic conduct, because the defendant possessed photographs depicting the "subjection of a young child to a sexual act that would be painful." Finally, the five-level enhancement under §2G2.2(b)(2) for distribution for gain applies if the distribution was for the receipt or expectation of receipt of a thing of value. Because the defendant traded child pornography in exchange for other child pornography, he distributed child pornography so that he would receive a thing of value.

United States v. Caro, 309 F.3d 1348 (11th Cir. 2002). The defendant was convicted of possession, receipt, and transportation of child pornography. The defendant had in his possession on his computer 30,000 images of child pornography, including depictions of children from infants to teenagers engaged in sexual activity that showed very young children engaged in anal and vaginal intercourse with adult males and children in bondage or being tortured. The district court erred in refusing to apply a four-level enhancement, pursuant to §2G2.2(b)(3), based on its reasoning that the government had to present expert medical evidence to support a finding that the images of child pornography the defendant possessed were sadistic, masochistic, or otherwise violent. The Eleventh Circuit noted that it had previously held that the act of anal and vaginal penetration of children between eight and eleven years of age would be considered sadistic, and that it had not imposed a requirement that the government must present expert testimony to support a §2G2.2(b)(3) enhancement. Accordingly, the court concluded that the four-level enhancement was warranted under that subsection.

United States v. Dodds, 347 F.3d 893 (11th Cir. 2003). The defendant was found guilty of knowingly possessing material that contained images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and knowingly receiving obscene pictures in violation of 18 U.S.C. § 1462. At the sentencing, the PSR applied the cross reference in §2G3.1 and recommended that the defendant be sentenced under §2G2.4. The district court sentenced the defendant under §2G2.2, resulting in a higher sentence. The Eleventh Circuit held that when a district court applied §2G3.1(c)(1)'s cross-reference, sentencing was appropriate under §2G2.2 only if the government could show receipt with the intent to traffic. The court further noted that merely showing that a defendant was in possession of a large number of illegal images would usually not be sufficient to imply an intent to traffic. Accordingly, the case was remanded to the district court to determine whether there was sufficient evidence to support the conclusion that

defendant had “received” the pornography with intent to traffic, and therefore to consider whether §2G2.2 or §2G2.4 applied.

See United States v. Dunlap, 279 F.3d 965 (11th Cir. 2002), §1B1.3, p. 2.

United States v. Hall, 312 F.3d 1250 (11th Cir. 2002), *cert. denied*, 538 U.S. 954 (2003). The district court erred in not applying a four-level enhancement for sadistic conduct where the image portrayed an adult male vaginally penetrating a young girl.

United States v. Probel, 214 F.3d 1285 (11th Cir.), *cert. denied*, 531 U.S. 939 (2000). The Eleventh Circuit held that the district court did not err in finding that the defendant did not have to act for a pecuniary interest or other gain in distributing child pornography to have his base offense level enhanced by five levels under §2G2.2(b)(2). The defendant pled guilty to distributing child pornography over the Internet to an undercover law enforcement officer without any pecuniary gain, and argued that the enhancement did not apply. The circuit court held that the plain language of the guidelines and the application notes do not require pecuniary or other gain for the enhancement to apply.

§2G2.4 Possession of Materials Depicting a Minor Engaging in Sexually Explicit Conduct
[Deleted]

See United States v. Bender, 290 F.3d 1279 (11th Cir.), *cert. denied*, 537 U.S. 1037 (2002), §2G2.2, p. 16.

United States v. Harper, 218 F.3d 1285 (11th Cir. 2000). The district court correctly found that separate computer files on one computer disk counted as distinct “items” under §2G2.4 providing for a two-level enhancement if the child pornography offense involved possessing ten or more items. The defendant pled guilty to one count of possession of child pornography when his probation officer found a computer zip disk containing 600 to 1,000 pictures involving the sexual exploitation of minors in more than ten files, and argued that the disk constituted only one “item” for sentencing purposes. The Eleventh Circuit held that a computer hard drive is more similar to a library than a book because a hard drive can store thousands of documents and visual depictions, and that each file within the drive is akin to a book or magazine.

United States v. Lebovitz, 401 F.3d 1263 (11th Cir. 2005). The district court enhanced the defendant’s sentence because he possessed large quantities of child pornography, §§2G2.4(b)(2) & (b)(5)(C), because he used a computer to obtain his child pornography, §2G2.4(b)(3), and because he possessed child pornography with sadomasochistic images, §2G2.4(b)(4). The defendant contended that the district court double counted in two ways his possession of child pornography and use of a computer in obtaining child pornography. Reviewing the claim of double counting *de novo*, the Eleventh Circuit noted that “[a]bsent a specific direction to the contrary, we presume that the Sentencing Commission intended to apply separate sections cumulatively,” and as a result, a defendant asserting a double counting claim

has a tough task. Congress meant to increase the penalties provided for possession of greater quantities of child pornography when it enacted §2G2.4(b)(5). For that reason, the court concluded that the simultaneous application of §§2G2.4(b)(2) and 2G2.4(b)(5) is not impermissible double counting.

United States v. Whitesell, 314 F.3d 1251 (11th Cir. 2002), *cert. denied*, 539 U.S. 951 (2003). The defendant pled guilty and was convicted of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The defendant met the victim in an Internet chat room, and, during the course of their acquaintance, the victim sent him visual images of herself engaging in sexually explicit conduct. At sentencing, the district court applied the cross-reference under §2G2.4(c)(1) to §2G2.1 based on its finding that the defendant caused or permitted the victim to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The court found that the term “causing” as used in §2G2.4(c)(1) “does not require a defendant to have physical contact with or personally photograph the victim” The court concluded that the time frame in which the victim transmitted the pornographic photograph and the defendant made his boastful comments showed that the defendant’s coaxing directly resulted in the victim photographing herself engaging in sexually explicit conduct.

Part J Offenses Involving the Administration of Justice

§2J1.7 Commission of Offense While on Release

United States v. Bozza, 132 F.3d 659 (11th Cir. 1998). The district court did not err in imposing a sentencing enhancement for commission of an offense while out on bond pursuant to §2J1.7 without having notified the defendant of the enhancement prior to the entry of his guilty plea. Section 2J1.7 does not require a district court to notify the defendant of the sentencing enhancement prior to accepting his or her guilty plea.

United States v. Williams, 59 F.3d 1180 (11th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996). The Sentencing Commission did not overstep its bounds in promulgating §2J1.7, which calls for a three-level enhancement if the defendant commits a federal offense while on release. "18 U.S.C. § 3147 authorizes the Commission to provide for enhancement for crimes committed while on release pursuant to the Bail Reform Act."

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

United States v. Adams, 329 F.3d 802 (11th Cir. 2003). The district court correctly applied a two-level enhancement to the defendant’s sentence pursuant to §2K2.1(b)(4). On appeal, the defendant argued that because he was charged with possession of a stolen firearm, enhancing the offense level based solely upon the stolen nature of the firearm constituted impermissible double counting. The Eleventh Circuit noted that although it had never addressed

the issue of whether the application of the two-level enhancement under §2K2.1(b)(4) constituted double counting when the offense of conviction involves a stolen firearm, other circuits had found the enhancement appropriate when a defendant's base offense level was not determined under subsection (a)(7). The court adopted the same reasoning as its sister circuits and held that the district court correctly applied the two-level enhancement.

United States v. Aduwo, 64 F.3d 626 (11th Cir. 1995). The defendant pled guilty to making false statements to acquire firearms and possession of a firearm by a convicted felon. The defendant was involved in an attempted armed robbery in which her co-conspirator carried a gun. The district court applied the cross-reference provision in §2K2.1 which directs the court to sentence the defendant according to the guideline for the offense that the defendant committed while in possession of the firearm. The defendant argued on appeal that the cross-reference provision was not applicable because she did not possess a firearm in connection with the attempted armed robbery, because the plan did not include the use of weapons, because she did not have possession of a weapon during the attempted robbery, and because she did not know a firearm was present during her participation in the crime. The Eleventh Circuit applied the Pinkerton rule of conspirator liability to §2K2.1, holding that since the co-conspirator's possession of a concealed firearm during the attempted robbery was foreseeable and in furtherance of a "drug rip-off," the possession of the firearm could be imputed to the defendant.

United States v. Fernandez, 234 F.3d 1345 (11th Cir. 2000), *cert. denied*, 532 U.S. 988 (2001). The defendant pled guilty to being a felon in possession of a firearm. The PSR set the base offense level at 24, in accordance with §2K2.1(a)(2), based on a finding that he had two prior felony convictions, including a conviction for carrying a concealed weapon to which the defendant pled *nolo contendere* but for which there was no adjudication of guilt. The defendant argued that this offense could not be used to determine his base offense. The guidelines clearly state if a prior conviction results in a criminal history point under §4A1.1, the conviction is to be considered a conviction under §2K2.1(a)(2). An offense that resulted in a plea of *nolo contendere* with no adjudication of guilt is to be included in the criminal history calculation of §4A1.1. Accordingly, the district court did not err in finding that a plea of *nolo contendere*, where an adjudication of guilt has been withheld, qualifies as a "conviction" for calculating the defendant's base offense level under the guidelines.

United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001). The defendant was convicted of possession of a firearm by a convicted felon. The district court concluded that, during his arrest, the defendant had reached for his gun during the struggle with the arresting officers, thus justifying a four-level increase for possession of the firearm in connection with another felony offense. The district court also applied a three-level enhancement under §3A1.2(b) for having created a substantial risk of serious bodily injury to a person the defendant knew or had reason to believe was a law enforcement officer. The Eleventh Circuit determined that both enhancements were properly applied and did not constitute impermissible double counting.

United States v. Jamieson, 202 F.3d 1293 (11th Cir. 2000). The defendant pled guilty to felonious possession of a firearm. The district court increased the defendant's sentence pursuant to §2K2.1(a)(3) based on his possession of a Norinco semiautomatic rifle. The rifle was not one

of the specifically banned firearms under the Violent Crime Control Act and did not display two or more statutorily proscribed characteristics. Because the firearm was not specifically listed and did not display two of the characteristics of banned semi-automatic rifles, the circuit court vacated the sentence.

United States v. Laihben, 167 F.3d 1364 (11th Cir.), *cert. denied*, 527 U.S. 1029 (1999). At sentencing, the district court included a 1995 New York robbery conviction as a prior felony conviction for the defendant and accordingly assigned the defendant a base offense level of 20, pursuant to §2K2.1(a)(4)(A). On appeal, the defendant argued that the district court erred in calculating his offense level because he was convicted of the New York robbery after committing the federal crimes at issue in this case. The defendant further argued that his 1995 conviction was not a prior felony conviction under §2K2.1(a). The Eleventh Circuit noted that the commentary to §2K2.1 directed the sentencing court to count any “prior conviction that receives any points under §4A1.1(Criminal History Category).” Relying on *United States v. Walker*, 912 F.2d 1365 (11th Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991), the court concluded that the defendant’s 1995 sentence for robbery qualified for criminal history points for purposes of §4A1.1 because it was imposed prior to sentencing for the instant offense. Because it qualifies for criminal history points, it is therefore a prior conviction for purposes of §2K2.1(a).

United States v. Rhind, 289 F.3d 690 (11th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003). The defendants challenged a four-level enhancement under §2K2.1(b)(5) for possession of firearms, arguing that sufficient evidence failed to demonstrate that they possessed the firearms “in connection with” the underlying felony offense. The court interpreted “in connection with” according to its ordinary meaning, including that the firearm does not have to facilitate the underlying offense. The court concluded that adequate facts supported the enhancement here because while passing counterfeit currency while driving across several states, the defendants kept a disassembled handgun under the rear passenger seat and ammunition for the gun in the console between the front seats.

United States v. Simmons, 338 F.3d 1335 (11th Cir.), *cert. denied*, 540 U.S. 1107 (2004). The defendant argued that the district court erred in considering the 2002 sentencing guidelines rather than basing his sentence entirely on the 2001 guidelines, which were in effect when the defendant was convicted but not when he was sentenced. The circuit court determined that the 2001 guidelines should be applied. The court chose to make an upward departure based on the fact that, had the career offender guideline been applicable the defendant’s sentence would have been much higher.

United States v. Vega, 392 F.3d 1281 (11th Cir. 2004). The defendant pled guilty to three counts of making false statements in connection with the purchase of firearms in violation of 18 U.S.C. § 924(a)(1)(A). At sentencing, the district court set the defendant's offense level at an enhanced 18 because his offense involved an Action Arms UZI, a semiautomatic assault weapon. The defendant objected to the enhancement on the theory that it could only reach illegal UZIs--that is, UZIs manufactured after semiautomatic weapons were banned in 1994--and that the government had not proven that the UZI involved in the transaction at issue was an illegal one under the ban. The appellate court held that the statutory exemption from prosecution

for possession of semiautomatic assault weapons manufactured before enactment of Violent Crime Control Act did not exclude an enhanced base offense level for offenses involving such weapons. The court reasoned that the Sentencing Commission could rationally have decided to increase the penalty for supplying false information in connection with such a purchase, Congress clearly intended to single out and penalize semiautomatic weapons, and the risk to society when a person makes false statements regarding a semiautomatic firearm purchase does not hinge on the manufacture date of the weapon.

United States v. Wimbush, 103 F.3d 968 (11th Cir. 1996), *cert. denied*, 520 U.S. 1247 (1997). The appellate court affirmed the district court's calculation of the defendant's sentence pursuant to §2K2.1. The defendant argued that §2K2.1, as amended, was invalid because it substantially increased the punishment level without adequately explaining the reasons for the changes, as required by the Administrative Procedures Act ("APA"). The appellate court disagreed, and held that "Federal courts do not have authority to review the Commission's actions for compliance with APA provisions, at least insofar as the adequacy of the statement of the basis and purpose of an amendment is concerned."

§2K2.4 Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

United States v. Bazemore, 138 F.3d 947 (11th Cir. 1998). The district court did not err in denying Bazemore's 28 U.S.C. § 2255 motion to vacate his conviction for using or carrying a firearm in connection with a drug trafficking offense. *Bazemore* argued that the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), meant that the conduct he pled guilty to, participating in a drug trafficking crime in which a codefendant carried a weapon, did not violate 18 U.S.C. § 924(c). The court of appeals upheld the district court's finding that *Bazemore* had aided and abetted his codefendant in "carrying" the weapon, and that he was therefore liable for the crime and his plea was properly accepted.

United States v. Brown, 332 F.3d 1341 (11th Cir. 2003). The defendant pled guilty to two counts: using or carrying a firearm during and in relation to any crime of violence or drug trafficking crime, in violation of 18 U.S.C. § 924(c), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The issue on appeal was whether Amendment 599 and the current version of §2K2.4 precluded the application of a §2K2.1(b)(5) four-level enhancement for possession of a firearm in connection with another felony offense to defendant's section 922(g) conviction for being a felon in possession of a firearm, when he was also sentenced for his section 924(c) conviction for using or carrying firearms during and in relation to a drug trafficking offense. The Eleventh Circuit held that the district court erred in enhancing defendant's sentence because the §2K2.1(b)(5) enhancement applied to defendant's section 922(g) conviction and defendant's conviction under section 924(c) punished twice the same wrong of possessing a firearm in connection with the underlying felony of drug trafficking.

United States v. Diaz, 248 F.3d 1065 (11th Cir. 2001). The district court erred in applying a five-level enhancement based on the brandishing or possession of a firearm by a codefendant, in light of an amendment to the guidelines. That amendment prohibits any weapon

enhancement for the underlying offense if a codefendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under § 924(c). The effect of the amendment is that relevant conduct cannot be used to enhance the offense level for the Hobbs Act conspiracy, substantive Hobbs Act violations, and carjacking convictions of one defendant based on the fact that a codefendant brandished or possessed a weapon.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Alfaro-Zayas, 196 F.3d 1338 (11th Cir. 1999). At sentencing, the defendant made an oral motion to depart downward on the grounds that the 1992 drug conviction overstated the seriousness of his criminal conduct because the conduct underlying that conviction and his classification as an aggravated felon was a \$20 sale of cocaine base. The district court denied the motion, stating that it did not have the discretion to depart downward and that §4A1.3 did not apply. On appeal, the Eleventh Circuit determined that the district court correctly concluded that it was not empowered under §4A1.3 to depart downward from the offense level under §2L1.2. The court also concluded that the district court correctly noted that its disagreement with the policy under which the defendant's sentence was calculated did not provide it with authority to depart downward.

United States v. Anderson, 328 F.3d 1326 (11th Cir. 2003). The defendant was convicted of illegal reentry after deportation. The defendant was deported in 1991 after he pleaded *nolo contendere* to a Florida felony drug offense. The district court imposed a 12-level enhancement pursuant to §2L1.2(b)(1)(B) because the defendant had been previously deported after a conviction. On appeal, the defendant argued that a *nolo contendere* plea with adjudication withheld did not qualify as a conviction within the meaning of §2L1.2(b)(1)(B). The Eleventh Circuit determined that the term "conviction" as used in §2L1.2(b) was governed by the definition set forth in § 1101(a)(48)(A) and included a *nolo contendere* plea with adjudication withheld as long as punishment, penalty, or restraint on liberty was imposed. Accordingly, the court upheld the lower court's application of the enhancement.

United States v. Camacho-Iraquen, 2005 WL 1297236 (11th Cir. 2005). The defendant challenged a 16-level enhancement under §2L1.2 for reentering the country after deportation following a conviction for a crime of violence. The defendant argued that the enhancement applies only to offenses for which the conviction occurred within the previous ten years. The Eleventh Circuit held that §2L1.2 has no time limit with regard to the date of conviction. Neither the text of the section nor the application notes that follow state that a conviction must have occurred within a particular time period before the current offense for the §2L1.2 enhancements to apply. If the Sentencing Commission had intended to have a time limit for the convictions, there is no reason it would not have written an explicit time restriction in the guideline.

United States v. Chavarriya-Mejia, 367 F.3d 1249 (11th Cir.), *cert. denied*, 125 S. Ct. 95 (2004). The defendant pled guilty to reentry after deportation and received a 16 level crime of violence enhancement based on his prior conviction for statutory rape. The Eleventh Circuit agreed with the district court that statutory rape is a crime of violence. The guidelines section defined crime of violence to include forcible sex offenses, including sexual abuse of a minor. Regardless of whether the child consents, the law presumes that the physical contact aspects of statutory rape were not agreed to.

United States v. Christopher, 239 F.3d 1191 (11th Cir.), *cert. denied*, 534 U.S. 877 (2001). The district court did not err in finding that the defendant's state conviction for shoplifting was an "aggravated felony" for purposes of §2L1.2. The defendant was given a 16-level enhancement for illegally reentering the United States after being deported following a conviction for misdemeanor shoplifting offenses. He was sentenced to 12 months but his sentence was suspended. Agreeing with other circuits, the circuit court found the language of the statute did not apply to only those crimes that are felony crimes by nature. Congress defined a term of art and "aggravated felony" includes certain misdemeanants who receive a sentence of one year.

United States v. Drummond, 240 F.3d 1333 (11th Cir. 2001). The district court did not err in applying the 16-level enhancement for deportation after sustaining an aggravated felony. The Eleventh Circuit found that the defendant's prior state conviction for menacing qualified as an "aggravated felony" for purposes of §2L1.2. Menacing is a crime of violence under the definition in the enhancement because menacing under the state law includes placing another in fear of physical injury, serious injury or death.

United States v. Fuentes-Rivera, 323 F.3d 869 (11th Cir.), *cert. denied*, 540 U.S. 856 (2003). The defendant pled guilty to re-entry into the United States after a conviction in California for burglary in the first degree. Pursuant to §2L1.2(b)(1)(A)(ii), the district court enhanced the defendant's sentence because his deportation occurred after the felony conviction for a "crime of violence." On appeal, the defendant argued that, since burglary under California law did not include the use, attempted use, or threatened use of physical force as an element of the offense, his 1995 conviction for first-degree burglary did not qualify as a "crime of violence." Because the Sentencing Commission included "burglary of a dwelling" in Application Note 1(B)(ii)(II)'s list of offenses, despite the fact that burglary, or at least "generic" burglary, had never had as an element the use, attempted use, or threatened use of physical force against another, the Eleventh Circuit held that the district court did not err in determining that burglary of a dwelling was a "crime of violence" under §2L1.2(b)(1)(A)(ii).

United States v. Guzman-Bera, 216 F.3d 1019 (11th Cir. 2000). The district court enhanced the defendant's sentence upon his guilty plea to illegally reentering the United States after his deportation. The defendant had been found guilty in state court for grand theft, third degree, and was sentenced to five years' probation. The circuit court stated that "aggravated felony" under the statute is defined in terms of the sentence actually imposed, and includes a theft offense only if the term of imprisonment imposed was at least a year. Had the defendant received a suspended sentence followed by probation, the enhancement may have been

applicable. But when a court does not order a period of incarceration, the conviction is not an “aggravated felony” under §2L1.2.

United States v. Lozano, 138 F.3d 915 (11th Cir. 1998). The defendant had been convicted for cocaine distribution and deported in 1992. He was discovered in the United States in 1996 and pled guilty to illegal reentry after deportation in violation of 8 U.S.C. § 1326(a). The court imposed a 16-level increase under §2L1.2(b)(2) because the previous deportation was subsequent to an aggravated felony. The defendant argued the enhancement violated the *Ex Post Facto* Clause by punishing him for earlier conduct under a law and guideline not in effect at the time of the conduct. The court of appeals determined that no *ex post facto* violation had occurred because the offense for which defendant was sentenced was being found in the United States after illegally reentering the country. At the time of the commission of that offense, the penalties were unambiguous.

United States v. Maldonado-Ramirez, 216 F.3d 940 (11th Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001). The defendant was found guilty after a bench trial for illegally entering the United States after being deported following a conviction in state court for attempted burglary and aggravated assault. The state sentence imposed was one to five years for the attempted burglary and three to ten years for the aggravated assault. The defendant was deported, however, after serving only seven months, and the district court suspended the rest of the sentence upon his deportation. He argued that this conviction was not an aggravated felony. The Eleventh Circuit held that the definition of “aggravated felony” under the enhancement in §2L1.2 referred to the term of imprisonment imposed and not the term actually served and affirmed the application of the enhancement.

United States v. Orduno-Mireles, 405 F.3d 960 (11th Cir. 2005). The defendant argued that neither of his two prior felony convictions for unlawful sexual activity with certain minors and for burglary of a dwelling could be used to support the crime of violence enhancement under §2L1.2. The Eleventh Circuit affirmed his sentence, holding that the district court did not err in applying the 16 level enhancement. A felony conviction for unlawful sexual activity with certain minors qualifies as a crime of violence within the guidelines definition, either as sexual abuse of a minor or statutory rape. Moreover, the definition of “prior crime of violence” unambiguously includes the burglary of a dwelling. Accordingly, either prior felony conviction supported the district court’s imposition of the §2L1.2(b)(1)(A) enhancement.

United States v. Padilla-Reyes, 247 F.3d 1158 (11th Cir.), *cert. denied*, 534 U.S. 913 (2001). The defendant pled guilty to illegally reentering the United States after being deported. Prior to his deportation, the defendant pled *nolo contendere* to a second degree state felony for a lewd, lascivious, or indecent assault or act upon or in the presence of a child. He argued that “aggravated felony” under §2L1.2 is ambiguous because it is not clear whether physical contact is a necessary element of the offense. The Eleventh Circuit held the term “sexual” in “sexual abuse of a minor” as found in “aggravated felony” indicates the perpetrator’s intent in committing the abuse is to seek libidinal gratification and “sexual abuse of a minor” is therefore not limited to physical abuse. The district court thus did not err in holding that a violation of a state statute criminalizing sexual offenses not rising to the level of rape or sexual battery, but

committed against children under 16 years of age, constituted an “aggravated felony” under §2L1.2.

United States v. Wilson, 392 F.3d 1243 (11th Cir. 2004). The defendant was convicted of illegal reentry after deportation, and the court increased his offense level by 16 levels, determining that the defendant’s prior conviction for aggravated child abuse was a crime of violence. The defendant appealed, arguing that his Florida conviction for aggravated child abuse did not qualify as a “crime of violence” under §2L1.2(b)(1)(A)(ii). Although the defendant conceded that the offense had as an element the use of physical force, he asserted that it did not qualify as a crime of violence because it was not listed as one of the enumerated offenses described in the second subpart of the guideline. Essentially, the defendant asserted that the construct of this guideline section required that the requirements of both subparts must be met before a prior conviction qualified as a “crime of violence.” The court categorically rejected this argument, stating that it would render subpart (I) mere surplusage, because unless an offense were listed in subpart (II), it would never qualify as a crime of violence. It is enough that an offense either falls under the general definition in the first subsection or is included among the enumerated offenses in the second subsection to qualify for the 16-level enhancement.

§2L2.1 Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

United States v. Kuku, 129 F.3d 1435 (11th Cir. 1997), *cert. denied*, 524 U.S. 909 (1998). The district court erred in applying §2F1.1, the guideline for fraud, deceit and forgery, to calculate the defendant’s sentence because §2L2.1, involving counterfeit identification documents, more aptly characterized the offense conduct. The defendant’s conduct, encouraging and inducing aliens to reside in the United States, making false statements on applications for social security cards, and producing social security cards without lawful authority, arose from her participation in a conspiracy to unlawfully produce social security cards and sell them to illegal aliens.

United States v. Polar, 369 F.3d 1248 (11th Cir. 2004). The defendant was convicted of possessing a counterfeit United States ADIT stamp. He used the stamp to help aliens obtain Social Security cards. The district court applied §2L2.1(b)(3), which provides for a four-level increase if the defendant knew, believed or had reason to believe that the passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving the violation of the immigration laws. The court held that fraudulently obtaining a Social Security card, even if for the purpose of perpetuating immigration fraud, was not a violation of the immigration laws. The court concluded that term includes only those laws that “criminalize conduct necessarily committed in connection with the admission or exclusion of aliens.” The court thus upheld the enhancement.

Part N Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws

§2N2.1 Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

United States v. Kimball, 291 F.3d 726 (11th Cir. 2002). The defendant who was convicted of distributing a prescription drug without a prescription with the intent to defraud or mislead was found guilty of an offense that necessarily involved fraud and thus was properly sentenced under the fraud guideline, rather than under §2N2.1 dealing with any food, drug, biological product, device, cosmetic, or agricultural product.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Bradford, 277 F.3d 1311 (11th Cir.), *cert. denied*, 537 U.S. 918 (2002). Under §2P1.1(b)(2), any defendant convicted of escape is entitled to a seven-level reduction of the base offense level if the defendant "escaped from a non-secure custody and returned voluntarily within 96 hours." If, while away from the facility, the defendant committed any offense punishable by a term of imprisonment of one year or more, the reduction does not apply, per §2P1.1(b)(2). The reduction was not applicable here because the defendant committed new offenses while away from the facility and did not return voluntarily.

Part Q Offenses Involving the Environment

§2Q1.3 Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

United States v. Perez, 366 F.3d 1178 (11th Cir. 2004). The defendant, the owner and operator of a business that hauled solid waste and vegetive debris, had his trucks dump waste at two protected wetlands sites that he owned. The district court applied an increase under §2Q1.3 for an offense involving a discharge without a permit. The defendant appealed, asserting that application of this enhancement constituted impermissible double counting. The Eleventh Circuit held that the increase was not double counting because the defendant's base offense level under §2Q1.3 only accounted for the mishandling of environmental pollutants, and did not account for the permit element of his criminal conduct. The defendant also challenged imposition of the four-level increase under §2Q1.3(b)(1) for an offense that otherwise involved a discharge, release or emission of a pollutant. The court rejected the defendant's argument that the government must prove actual contamination for the enhancement to apply.

Part R Antitrust Offenses

§2R1.1 Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

United States v. Giordano, 261 F.3d 1134 (11th Cir. 2001). The defendants were convicted of price-fixing. On appeal, the defendants argued that the one-level enhancement under §2R1.1(b)(2) did not apply to them because: 1) the volume of commerce affected in the

price fixing scheme was well below the \$400,000 threshold necessary to trigger the application of the one-level enhancement, instead of the government figures of \$636,153.66 and \$839,043.80 accepted by the district court; and 2) the conspiracy was a “non-starter.” *Id.* at 1144-45. The court found that the district court based its volume of commerce calculation on sales during the period between October 24, 1992 and December 31, 1992, a period within which the court determined the conspiracy to be effective based on the evidence provided by the government. The appellate court concluded that because the conspiracy was effective during that period of time, the district court “did not err in including in the volume of commerce affected all sales of the affected products between October 24, 1992, and December 31, 1992, which resulted in a figure that exceeded the threshold of \$400,000.” *Id.*

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

United States v. Adams, 74 F.3d 1093 (11th Cir. 1996). The district court refused to apply §2S1.1 to the defendants' convictions under 18 U.S.C. § 1956, thereby reducing the defendant's base offense level by ten levels in this case. The appellate court held that the jury found the defendants guilty of violating section 1956, and thus §2S1.1 must be applied. It rejected the district court's rationale that the gravamen of the defendants' unlawful conduct was fraud and misapplication of RTC funds, holding that "Congress intended to criminalize a broad array of money laundering activity, and included within this broad array is the activity committed" by the defendants. However, the appellate court remanded for further findings with respect to the district court's second justification that the sentence reflected a downward departure under §5K2.11.

United States v. De LaMata, 266 F.3d 1275 (11th Cir. 2001), *cert. denied*, 535 U.S. 989 (2002). The defendants were convicted of bank fraud, money laundering, false statements, false entries, and misapplication of bank funds. The district court grouped the offenses, then applied the guideline (§2S1.1) that produced the highest offense level, pursuant to §3D1.3(b). A defendant argued that the fraud guideline more fully captured the nature of his crimes, and that his money laundering, via bank fraud, was atypical for that crime. The Eleventh Circuit disagreed. It first noted that not applying the money laundering guideline would nullify the jurors' verdict on that issue; moreover, it found that the money laundering here—separate monetary transactions designed to conceal past criminal conduct or to promote further criminal conduct—was within the heartland of §2S1.1.

United States v. Mullens, 65 F.3d 1560 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996). The district court did not err in calculating the amount of funds involved in the defendant's money laundering scheme. The defendant pled guilty to wire fraud, mail fraud and money laundering in relation to a "Ponzi" scheme. The defendant's money laundering and fraud convictions were grouped pursuant to §3D1.2. On appeal, the defendant argued that the district court erred in determining the value of funds by considering the total amount of money collected in the "Ponzi" scheme. The circuit court noted that when offenses are grouped pursuant to

§3D1.2, a sentencing court is "required to consider the total amount of funds that it believed was involved in the course of criminal conduct." The circuit court ruled that the amount of money collected by the defendant through fraud was co-extensive with the sums involved in the charged and uncharged money laundering counts thereby warranting a ten-level enhancement for laundering in excess of \$20 million.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

United States v. Hunerlach, 197 F.3d 1059 (11th Cir. 1999). The defendant pled guilty to filing false tax returns for three years, and the district court enhanced his sentence four levels pursuant to §2T1.1(b)(2) because it determined the total "tax loss" to be over \$3 million, including the accrued interest and penalties. Because the commentary to §2T1.1 states that "tax loss" does not include interest and penalties, the Eleventh Circuit found for purposes of determining the base offense level for willfully evading payment of tax, the loss does not include interest and penalties, and vacated the defendant's sentence.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

United States v. Puche, 350 F.3d 1137 (11th Cir. 2003). The defendants were convicted of conspiracy to commit money laundering. The defendants argued that under §2X1.1(b)(2) they were entitled to a three-level reduction in their sentence because they had not completed or were not close to completing all the acts they believed necessary for the completion of the money laundering scheme, especially with regard to the \$6 million in future transactions. The Eleventh Circuit noted that the intended laundering of \$6.7 million required an eight-level increase under §2S1.1(b)(2)(1). This offense level, however, had to be reduced by three levels because defendants had not completed or were not close to completing all the acts they believed necessary to laundering the \$6 million in future transactions. Thus, the application of §2X1.1(b)(2) resulted in a five-level increase. In contrast, the actual laundering of \$714,500 would have resulted in a four-level increase under §2S1.1(b)(2)(E). Hence, the five-level increase under §2X1.1(b)(2), the greater of the two offense levels, became the operative offense level for defendants. The court held that, as a proper application of the guidelines would result in a lower offense level for the defendants, the district court erred by not applying §2X1.1, and therefore the defendants' sentences were vacated and remanded.

CHAPTER THREE: Adjustments

Part A Victim-Related Adjustments

§3A1.1 Hate Crime Motivation or Vulnerable Victim

United States v. Malone, 78 F.3d 518 (11th Cir. 1996). The district court did not err in imposing a vulnerable victim enhancement to the defendant's sentence for the carjacking of a taxicab driver. The court noted that enhancing a defendant's sentence based solely on his membership in a more "vulnerable class" of persons is not consistent with the purpose behind §3A1.1 because the vulnerable victim enhancement is intended to "focus chiefly on the conduct of the defendant and should be applied only where the defendant selects the victim due to the victim's perceived vulnerability." However, in this case, the defendant testified that calling for a cab saved him from having to go out and find a victim. The cab driver in this case was obligated under a city ordinance to respond to all dispatcher calls, including the call in question to a deserted neighborhood making him more vulnerable than cab drivers in general to carjacking.

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002). The district court applied the vulnerable victim enhancement because the bank tellers in a bank robbery were vulnerable victims. Although bank tellers are not automatically vulnerable victims by virtue of their position, here, the defendant selected the bank to rob because it was a rural bank with little law enforcement in the area. The enhancement thus applied.

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), *cert. denied*, 516 U.S. 1166 (1996). The district court enhanced the defendant's base offense level pursuant to §3A1.1, the vulnerable victim guideline. The defendant argued on appeal that the district court erred in applying §3A1.1 because vulnerability for sentencing purposes is measured at the time of the commencement of the crime and the victim's vulnerability in this case, which was defined as his absence from the country, occurred after the crime began. The circuit court ruled that the enhancement was properly applied in this case because the defendants had "targeted" the victim to take advantage of his vulnerability: his absence from the country. The circuit court limited its ruling in scope, holding that the defendants' attempt to exploit the victim's vulnerability will result in an enhancement even if that vulnerability did not exist at the time the defendant initially targeted the victim where the thrust of the wrongdoing was continuing in nature.

§3A1.2 Official Victim

United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004), *judgment vacated*, 125 S. Ct. 1044 (2005), *opinion reinstated*, 2005 WL 1052236 (11th Cir. 2005). The defendant was convicted of drug trafficking, unlawful firearms possession, and attempting to kill an official in the performance of official duties with intent to interfere therewith. The district court applied the official victim increase under §3A1.2. The defendant claimed that he was not aware of the official status of the police officer before shooting him. The Eleventh Circuit affirmed, holding that record supported the lower court's conclusion that the police announced their presence before entering the residence where the defendant was located so that the defendant knew of the victim's status before shooting him.

See United States v. Jackson, 276 F.3d 1231 (11th Cir. 2001), §2K2.1, p. 19.

§3A1.3 Restraint of Victim

United States v. Hidalgo, 197 F.3d 1108 (11th Cir. 1999), *cert. denied*, 530 U.S. 1244 (2000). The district court did not err by enhancing the defendant's offense level for restraint of victim even though the victim was a co-conspirator. The co-conspirator was suspected of betraying the other defendants and was restrained by the defendants. The Eleventh Circuit held the sentence was properly enhanced because the guideline contemplates the restraint of any victim, co-conspirator or otherwise.

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Glover, 179 F.3d 1300 (11th Cir. 1999), *cert. denied*, 533 U.S. 936 (2001). Supervision over the assets of a conspiracy is not enough to qualify a defendant for an aggravating role increase under §3B1.1. Note 2 of the commentary explicitly declares that the provision applies only if the defendant was the organizer, leader, manager or supervisor of one or more participants. Assets management by itself is grounds for a departure, but not for a role-in-the-offense adjustment.

United States v. Jiminez, 224 F.3d 1243 (11th Cir. 2000), *cert. denied*, 534 U.S. 1043 (2001). The district court did not err in applying a two-level enhancement for defendant's role as a supervisor when he maintained control or influence over only one individual. The Eleventh Circuit found testimony that the defendant's girlfriend had to consult with him before she could agree to sell methamphetamine and taped telephone conversations indicating that the girlfriend would consult with the defendant who could be heard in the background were sufficient to support the enhancement.

United States v. Mesa, 247 F.3d 1165 (11th Cir.), *cert. denied*, 534 U.S. 912 (2001). The defendant's sentence had previously been vacated by the Eleventh Circuit and remanded for a more specific finding of fact on whether the defendant was an organizer or leader in the offense.

On remand, the district court made a series of specific findings of fact to show that the defendant was an organizer or leader. On a second appeal, the defendant argued that the findings of fact were clearly erroneous because they were not supported by the record. The circuit court found the evidence presented in the PSR and in testimony supported a finding of fact that the defendant controlled and directed the acts of several people involved in the drug conspiracy, including at least three people who stored and delivered cocaine for him, others who unloaded and prepacked vehicles, and at least one interpreter who translated during drug transactions. Therefore, the district court did not err in finding that he acted as an organizer or leader and the enhancement was properly applied.

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002). Abundant evidence supported the two-level enhancement for leadership role, pursuant to §3B1.1(c): The defendant did most of the planning and preparation for the bank robbery, including selecting the bank. The defendant first suggested the idea of a bank robbery, selected the bank, provided the guns, and agreed to "take care of the details." The defendant trained accomplices, diagramed the bank, and purchased a police scanner and monitored it from the getaway car during the robbery.

United States v. Suarez, 313 F.3d 1287 (11th Cir. 2002), *cert. denied*, 538 U.S. 968 (2003). A four-level enhancement for leadership role in drug conspiracy was proper because the defendant planned and organized hiding places, ordered co-conspirators, and was responsible for overseeing the distribution of drugs.

§3B1.2 Mitigating Role

United States v. Rodriguez-DeVaron, 175 F.3d 930 (11th Cir.) (*en banc*), *cert. denied*, 528 U.S. 976 (1999). Affirming the decision of the district court in denying the defendant's request for a minor role adjustment, a majority of the *en banc* Court of Appeals for the Eleventh Circuit announced the principles for determining whether a defendant qualifies for a "mitigating role" adjustment. The Eleventh Circuit held that the first, and most important, assessment a sentencing court must make is whether the defendant played a minor or minimal role in the relevant conduct used to calculate the base offense level. The same conduct is used both to set the defendant's base offense level and as the chief determinant of the defendant's role in the offense. If the defendant's relevant conduct and actual conduct are identical, the defendant cannot prove entitlement to a minor role adjustment simply by pointing to some broader criminal scheme in which she was a minor participant but for which she was not held accountable. Second, the sentencing court may measure the defendant's culpability in comparison to that of other participants in the relevant conduct. The district court should consider only the conduct of persons who are identifiable or discernible from the evidence and who were involved in the relevant conduct attributable to the defendant. The district court must determine that the defendant was less culpable than "most other participants" in an average, similar scheme, rather than just less culpable than the other discernible participants in the present scheme, in order to be entitled to a minor role adjustment. Finally, the court held that a defendant is not automatically precluded from consideration for a mitigating role adjustment in a case in which the defendant is held accountable solely for the amount of drugs he personally handled. *See also United States v. Boyd*, 291 F.3d 1274 (11th Cir. 2002) (the district court did not err in denying role reduction

where it properly analyzed the defendant's role in light of the relevant conduct for which he was held responsible and measured the defendant's role against the other participants in that relevant conduct which analysis revealed the defendant's integral role in the offense).

§3B1.3 Abuse of Position of Trust or Use of Special Skill

Abuse of Trust

United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997). The district court erred imposing the abuse of trust enhancement on the defendant because any abuse of his position at the Housing Authority was unrelated to the offense for which he was convicted, tax evasion. The court reasoned that the sentencing guidelines themselves say that the defendant's abuse of trust must "significantly facilitate the commission or concealment of the offense." In this context, "offense" must be read as "offense of conviction" in order to maintain consistency with the definition of relevant conduct in §1B1.3(a).

United States v. Britt, 388 F.3d 1369 (11th Cir. 2004). The defendant, a part-time clerk for the Social Security Administration, pled guilty to conspiracy to unlawfully process Social Security cards. The district court applied an abuse of trust increase under §3B1.3, which the defendant challenged on appeal. The appellate court upheld application of the adjustment. The record evidenced that the defendant was not a closely supervised employee with little discretion. Rather, she had discretion to accept, reject, or report for further investigation documentary evidence submitted to her in support of applications for Social Security cards, and was so loosely supervised that she was able, over a period of more than four years, to approve fraudulent Social Security card applications without detection.

United States v. Garrison, 133 F.3d 831 (11th Cir. 1998). The district court erred in applying an enhancement for abuse of a position of trust where the defendant was convicted of Medicare fraud. The defendant, the owner and chief executive officer of a home healthcare provider, and her company did not report directly to Medicare but to a fiscal intermediary whose specific responsibility was to review and to approve requests for Medicare reimbursement before submitting those claims to Medicare. Because of this removed relationship to Medicare, plus the intermediate review of the Medicare requests, the defendant was not directly in a position of trust in relation to Medicare.

United States v. Hall, 349 F.3d 1320 (11th Cir. 2003). The defendant was convicted of mail fraud and money laundering conspiracy. On appeal, the defendant argued that the district court erred by enhancing his sentence under §3B1.3 for abuse of position of trust due to his status as a pastor. The Eleventh Circuit noted that within the context of fraud it had found a position of trust to exist in two instances: 1) where the defendant stole from his employer, using his position in the company to facilitate the offense, and 2) where a fiduciary or personal trust relationship existed with other entities, and the defendant took advantage of the relationship to perpetrate or conceal the offense. The court noted that the instant case fell within the second situation, so to conclude that the defendant occupied a position of trust, the court had to find a personal trust relationship between the defendant and the victims. The defendant's status as a

pastor did not necessarily create a personal trust relationship between himself and the victims. With respect to the victims that the government presented, there was no personal trust relationship with the defendant so as to place him in a position of trust under the guidelines. Accordingly, the district court erred in applying a two-level enhancement under §3B1.3.

United States v. Harness, 180 F.3d 1232 (11th Cir. 1999). The district court did not err in enhancing the defendant's sentence for abuse of a position of trust. While employed by the Red Cross, Harness was named director of Project Happen which was responsible for the distribution of HUD funds. This position gave Harness check signing authority over Project Happen's accounts. Harness used his position to illegally divert Project Happen's funds and used his position to conceal his and his codefendants' fraudulent activities.

United States v. Linville, 228 F.3d 1330 (11th Cir. 2000), *cert. denied*, 532 U.S. 996 (2001). The district court properly enhanced the defendant's base offense level for abuse of position of trust even though the employer who "footed the bill" for the bank fraud, and not the bank, conferred that position of trust. 228 F.3d at 1331. The defendant used his signature authority given by his employer, a car dealership, to forge checks which he converted to his personal use. The circuit court concluded an enhancement for abuse of a position of trust is appropriate whenever the defendant was in that position with respect to the victim of the crime. Since the employer was also a victim, the enhancement was properly applied.

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001). The court examined whether a physician occupies a position of trust in relation to Medicare, concluding that the physician is in such a position. The court then turned to the particular facts of this case, asking, does the physician abuse that position of trust when the physician receives kickbacks for patient referrals, where the referrals were medically necessary and the physician does not falsify patient records or submit fraudulent claims to Medicare? The court concluded that the abuse of trust enhancement applied.

United States v. Long, 122 F.3d 1360 (11th Cir. 1997). The district court applied a §3B1.3 enhancement for abuse of a position of trust. While employed as a food service foreman in the United States Penitentiary-Atlanta, defendant was arrested while attempting to carry 85.1 grams of cocaine into the prison. Long acknowledged that the Bureau of Prisons "trusted" him in the colloquial sense but argued that he did not occupy a "position of trust." The Government countered that Long occupied a position of trust because prison officials did not search him when he entered the prison. The circuit court held that Long did not occupy a "position of trust" as §3B1.3 defines that term; the Government's reading would extend to virtually every employment situation because employers "trust" their employees; the guideline does not intend coverage this broad.

United States v. Morris, 286 F.3d 1291 (11th Cir. 2002). The defendant was represented by his co-conspirators as a professional trader and a licensed attorney. The Eleventh Circuit ruled that the enhancement cannot apply based solely on the representations of others. The defendant's status as an attorney does not necessarily mean he abused a position of trust. Instead, it must be shown that the attorney-defendant occupied a particular position of trust in relation to

the victims. The same fact-specific inquiry applies to financial advisors. More than discretion or control is required to justify the enhancement. Here, the fiduciary or trustee relationship necessary for a trader to abuse a position of trust with investors was not present and thus the enhancement did not apply, requiring reversal of the district court's sentence.

United States v. Njau, 386 F.3d 1039 (11th Cir. 2005). The defendant recruited two other individuals to receive mailings from Social Security Department of the Social Security cards that he had fraudulently arranged to be issued to illegal aliens, and recruited another individual to refer illegal aliens to him for Social Security numbers. The district court found that the defendant exercised supervisory authority over at least one other "participant" in Social Securities fraud scheme. The appellate court held that this finding was not clearly erroneous, and supported district court's three-level enhancement of the defendant's base offense level, notwithstanding the allegedly passive nature of the roles played by these three individuals in providing a place for cards to be mailed or in referring aliens to the defendant.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001). The district court properly enhanced the defendant's sentence for violations of absentee voter laws by one level for abuse of a position of trust where the defendant was a county deputy registrar. The fact that a codefendant who did not hold the same position of deputy registrar was convicted of the same offenses does not mean the defendant could not have significantly facilitated the commission of any of her offenses through her position. The Eleventh Circuit found the guideline does not require the position to be essential to a defendant's commission of the offense, only that the position facilitated this particular defendant's commission of it.

United States v. Ward, 222 F.3d 909 (11th Cir. 2000). The district court erred in applying the position of trust enhancement for an armed security guard who was not in a position of public or private trust. The circuit court held that because the security guard defendant had very little discretion in performing his duty and had no managerial authority, he was not in a position of trust sufficient to apply the enhancement.

Special Skill

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999), *cert. denied*, 532 U.S. 996 (2001). The district court did not err by applying an enhancement for "special skill" for a defendant who acted as the pilot in a conspiracy to import marijuana. The defendant contended that the two-level enhancement for "special skill" did not apply to a person who flies airplanes only as a hobby. The circuit court found the commentary defines "special skill" as "any skill not possessed by members of the general public" which "usually requires substantial education, training or licensing" and does not distinguish between professionals and amateurs.

United States v. Exarhos, 135 F.3d 723 (11th Cir. 1998), *cert. denied*, 526 U.S. 1029 (1999). The district court did not err in enhancing the defendant's sentence under §3B1.3 for use of a special skill where the defendants were convicted of altering or removing vehicle identification numbers from stolen automobile parts. The remote locations of the VINs require anyone seeking to obliterate or re-stamp them to possess specialized knowledge and mechanical

skill. Dismantling cars—not to mention abandoning them, recovering the shells, and then putting the cars back together—involves a combination of skills not possessed by the general public.

United States v. Foster, 155 F.3d 1329 (11th Cir. 1998). The district court did not err in applying a §3B1.3 enhancement to the defendant’s sentence for use of a special skill where the defendant possessed the skill of printing and used the skill to significantly facilitate the commission of his counterfeiting crime. Although printing does not require licensing or formal education, it is a unique technical skill that clearly requires special training such as setting up and calibrating the machinery and assisting in the operation of the printing machines. The defendant had worked in a legitimate printing business for about a year and possessed such special skills which he used to facilitate the crime.

§3B1.4 Use of a Minor To Commit a Crime

United States v. McClain, 252 F.3d 1279 (11th Cir. 2001). The Eleventh Circuit held that §3B1.4, which provides a two-level enhancement to a defendant’s base offense level if he uses or attempts to use a minor in the commission of the crime, does not contain a scienter requirement. The circuit court further held that the enhancement could be applied to participants in any criminal enterprise in which the use of a minor was reasonably foreseeable, regardless of whether a given participant personally recruited or used the minor.

Part C Obstruction

§3C1.1 Obstructing or Impeding the Administration of Justice

United States v. Banks, 347 F.3d 1266 (11th Cir. 2003). The defendant pled guilty to purchasing goods with credit cards issued to others, a violation of 18 U.S.C. § 1029. The defendant had given the police a false name upon arrest, a fact discovered after he bonded out. The PSR recommended a two-level sentence enhancement under §3C1.1, obstruction of justice, for providing materially false information to a law enforcement officer. The court adopted the PSR recommendation over the defendant’s objection. The appeals court stated that adopting the PSR recommendation was not enough. A factual determination was needed to determine that the defendant’s actions actually hindered the investigation and/or prosecution. It was not enough that the defendant intended to hinder, but that there had to be an actual obstructive effect before the enhancement could be applied. The sentence was vacated and the case remanded for further fact finding and resentencing.

United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004), *judgment vacated*, 125 S.Ct. 1044 (2005), *opinion reinstated*, 2005 WL 1052236 (11th Cir. 2005). The district court applied an obstruction of justice enhancement, predicated upon the defendant’s testimony at his suppression hearing that he did not hear the police announce their presence. The district court expressly found that this testimony was false and that the defendant manipulated his testimony to avoid responsibility for any knowledge that law enforcement was entering the house. The Eleventh Circuit affirmed, concluding that the district court’s findings established the defendant’s willful intent to provide false testimony.

United States v. Bradford, 277 F.3d 1311 (11th Cir.), *cert. denied*, 537 U.S. 918 (2002). The defendant appealed an obstruction of justice enhancement, pursuant to §3C1.1, for threatening a witness where there was no finding that the threats were communicated to the witness. The issue was whether indirect threats made to third parties constitute obstruction absent a showing that they were communicated to the target. Recognizing a circuit split, the court held that indirect threats can warrant the enhancement where, as here, a United States Marshal testified that other inmates informed him that the defendant had made threats against him and another inmate, both of whom were witnesses against the defendant.

United States v. Frasier, 381 F.3d 1097 (11th Cir. 2004). The defendant was being held in the county jail as a pretrial detainee, having been charged by the State of Florida with the bank robberies that led to his federal conviction. An FBI agent came to the jail and informed the defendant that the federal government was investigating the robberies and that he was a target of the investigation. Following the agent's visit, appellant attempted to escape from the jail. The district court applied a §3C1.1 increase because it found that the defendant had attempted to escape from a county jail to avoid federal prosecution. The defendant argued that the obstruction increase was inapplicable to him because no federal charges were pending at the time of the attempted escape. The Eleventh Circuit held that the district court properly applied the adjustment, because a federal agent had informed the defendant prior to his attempted escape that the federal government was going to prosecute him.

United States v. Garcia, 208 F.3d 1258 (11th Cir. 2000). The district court did not err in applying an enhancement for obstruction of justice in a conviction for conspiracy to distribute marijuana and carrying a firearm in connection with the conspiracy where the defendant acknowledged that after he murdered his drug supplier, he asked his secretary to go to his apartment to remove money, cocaine and other physical evidence. The defendant argued he did not obstruct justice because there was no federal investigation underway and that he was not a hindrance because the investigation had abundant evidence from other sources. The circuit court found there is no requirement that the obstructive act occur subsequent to a formal commencement of an investigation before the enhancement can be applied.

United States v. Singh, 291 F.3d 756 (11th Cir. 2002). The defendant was convicted of telephone fraud in which he used local and long distance service providers to allow third-parties to make foreign calls, for which he collected a fee, and then he would relocate without paying the telephone service providers. The defendant challenged a perjury-based obstruction of justice enhancement, pursuant to §3C1.1. Here, the district court made the requisite specific factual findings necessary to support the obstruction of justice enhancement. The district court determined that the defendant lied regarding material matters, and the Eleventh Circuit held that this finding was not clearly erroneous.

United States v. Smith, 231 F.3d 800 (11th Cir. 2000), *cert. denied*, 532 U.S. 1019 (2001). The district court properly enhanced codefendant's offense level for obstruction of justice by influencing an affiant to testify falsely and to identify material facts about which affiant testified falsely and for which codefendant was responsible. The circuit court found that

the codefendant did not request more specific findings of fact by the district court, and it was too late to complain in circuit court. Further, the circuit court found that detailed findings were not necessary.

United States v. Uscinski, 369 F.3d 1243 (11th Cir. 2004). The defendant withdrew for his own use about \$1.5 million dollars from a client's account in Austria. The government had previously informed the defendant that all his client's funds were drug-tainted and forfeitable to the government. When asked about the location of the money and purpose of the transfers, the defendant lied, stating that the money was to support his client's family. As a result, the government enlisted the help of foreign governments to trace the money and discovered that it had been used for the defendant's own use. The Eleventh Circuit affirmed an obstruction of justice increase in the offense level for defendant's tax evasion conviction. The court concluded that the defendant did not simply deny guilt, but rather concocted a false, exculpatory story that misled the government.

United States v. Zlatogur, 271 F.3d 1025 (11th Cir.), *cert. denied*, 535 U.S. 946 (2002). At the sentencing hearing, an agent testified regarding threats made by the defendant to an unindicted co-conspirator. On that basis, the district court applied the two-level obstruction of justice enhancement, pursuant to §3C1.1. The Eleventh Circuit affirmed, ruling that the enhancement could be based on hearsay testimony, as long as it was sufficiently reliable.

§3C1.2 Reckless Endangerment During Flight

United States v. Cook, 181 F.3d 1232 (11th Cir. 1999). The two defendants before the court took part in a three-man robbery of a credit union. Soon after an unmarked police vehicle took up pursuit of the trio, the defendants exited their car. The third participant proceeded to drive at a high rate of speed until he collided with a police vehicle. The district court ruled that the chase was a reasonably foreseeable consequence of their conspiracy to rob the credit union and that the defendants could therefore be held accountable for it under §3C1.2.

United States v. Wilson, 392 F.3d 1243 (11th Cir. 2004). The district court applied a reckless endangerment enhancement under §3C1.2, predicated upon the defendant's flight from law enforcement officers. An agent who chased the defendant and tackled him to the ground, sustained a sprain to his left finger. The Eleventh Circuit held that the enhancement was not properly applied because flight alone is insufficient to warrant an enhancement under this section. This guideline requires that the defendant "recklessly create[] a substantial risk of death or serious bodily injury to another person." The defendant's conduct, not that of the pursuing officers, must recklessly create the substantial risk of death or serious bodily injury to others. Since the defendant's flight by itself cannot be said to have recklessly created this level of risk, the district court erroneously imposed the enhancement.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Bradford, 277 F.3d 1311 (11th Cir.), *cert. denied*, 537 U.S. 918 (2002). The defendant appealed the district court's refusal to group his two counts of escape convictions under §3D1.2. Reviewing with due deference, the court noted that §3D1.2 provides four bases for grouping counts, but that the defendant did not specify on which grounds he relied. The court reviewed each basis and concluded that the district court did not err in declining to group the counts.

United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002), *cert. denied*, 537 U.S. 1217 (2003). The district court erred in treating as eight separate sentencing guidelines groups one count of conspiracy to travel in foreign commerce with intent to engage in sexual acts with minors since only a single act of conspiracy was alleged against the defendant.

United States v. Torrealba, 339 F.3d 1238 (11th Cir. 2003), *cert. denied*, 540 U.S. 1207 (2004). The defendant was convicted of one count of conspiracy to commit hostage taking, one count of hostage taking, and one count of using and carrying a firearm during and in relation to a federal crime of violence. At sentencing, the district court divided the defendant's offense into three groups pursuant to §§1B1.2(d) and 3D1.2 based on the three victims. On appeal, the defendant argued that the district court erred by dividing his offenses into three distinct groups based on three victims pursuant to §§1B1.2(d) and 3D1.2. The Eleventh Circuit held that where a conspiracy involved multiple victims, the defendant should be deemed to have conspired to commit an equal number of substantive offenses, and the conspiracy count should be divided under §3D1.2 into the same number of distinct crimes for sentencing purposes. Accordingly, the district court did not err in dividing defendant's conspiracy count into three separate groups under §3D1.2 based on three distinct victims.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Bourne, 130 F.3d 1444 (11th Cir. 1997). The district court did not err in allowing only a two-level reduction for the defendant's acceptance of responsibility, as his guilty plea on the last count was not timely. The court of appeals reasoned that when there are multiple counts of conviction, an adjustment for acceptance of responsibility is applied after all the offenses have been aggregated pursuant to §1B1.1. To be entitled to an adjustment, a defendant must accept responsibility for each crime to which he is being sentenced.

United States v. Garcia, 208 F.3d 1258 (11th Cir. 2000). It was not an error for the district court to find the defendant had failed to show an acceptance of responsibility for his offense that would warrant a reduction under the guidelines. The Eleventh Circuit held a guilty plea falls far short of showing acceptance of responsibility in circumstances where the defendant actively avoided responsibility by destroying evidence, hiding out in Canada, frivolously denying overwhelming identification evidence and frivolously claiming in Canada that he was subject to a federal death penalty for charges of conspiracy to distribute marijuana and carrying a firearm in connection with the conspiracy, in order to avoid extradition.

United States v. Singh, 291 F.3d 756 (11th Cir. 2002). The district court's determination of acceptance of responsibility is reviewed for clear error. Its determination that a defendant is not entitled to acceptance of responsibility will not be set aside unless the facts in the record clearly establish that a defendant has accepted personal responsibility. Because the district court determined that the defendant committed perjury at his sentencing hearing and that he only admitted to a minor part of his crimes, the district court properly refused acceptance of responsibility credit.

United States v. Smith, 127 F.3d 987 (11th Cir. 1997), *cert. denied*, 523 U.S. 1011 (1998). The district court did not err in considering the nature of the challenges to the presentence report in determining whether the defendant should receive a reduction for acceptance of responsibility. In his objections to the PSR, the defendant contended that he did not possess fraudulent intent with respect to both offense conduct and relevant conduct. These objections were factual, not legal, and amounted to a denial of factual guilt.

United States v. Starks, 157 F.3d 833 (11th Cir. 1998). The district court did not err in refusing to grant defendant a reduction for acceptance of responsibility where defendant's arguments at trial amounted to a factual denial of guilt and were, therefore, inconsistent with acceptance of responsibility. The court recognized that a defendant may, in rare situations, be entitled to a reduction for acceptance of responsibility even if he goes to trial, but here, the defendant denied having any fraudulent intent, an essential element of the charges on which he was convicted. The defendant's arguments at trial amounted to a factual denial of guilt and were, therefore, inconsistent with acceptance of responsibility.

United States v. Thomas, 242 F.3d 1028 (11th Cir.), *cert. denied*, 533 U.S. 960 (2001). A defendant who pled guilty to unlawful possession of firearms by a convicted felon was not entitled to a two-level reduction in his offense level for acceptance of responsibility when he forced the government to go to trial on two counts of possession with intent to distribute crack cocaine. The Eleventh Circuit agreed with other circuits and found that when a defendant indicted on multiple counts goes to trial on any of those counts and is therefore unwilling to accept responsibility for some of the charges, he has not really "come clean" or faced up to the full measure of his criminal culpability and is entitled to nothing under §3E1.1.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Adams, 403 F.3d 1257 (11th Cir. 2005). The offense conduct commenced no later than March 2, 2001. The defendant received one criminal history point for an August 1991 conviction. The defendant contested that point, arguing that he should not receive a criminal history point for that conviction because the offense occurred much earlier and the only reason he was sentenced in August 1991 was because of a busy state court docket. The appellate court held that the district court properly assessed a criminal history point for that conviction. The plain language of §4A1.1 and its commentary does not recognize an exception to the ten-year rule due to a backlog in the state court system.

United States v. Coeur, 196 F.3d 1344 (11th Cir. 1999). The district court did not err in applying §4A1.1 because the defendant committed the crime of being found in the United States after having been deported while he was serving another sentence, and not when he re-entered the United States. The defendant was found by INS in the United States while he was serving a sentence for possession of cocaine and resisting an officer. Because he was in jail on the date he committed the offense of being found in the country, the two point increase in his criminal history score was proper.

United States v. Cooper, 203 F.3d 1279 (11th Cir. 2000). The district court correctly applied one criminal history point under §4A1.1 for defendant's conviction for driving with a suspended license and possessing marijuana, both misdemeanors, even though he was unrepresented by counsel when he pled guilty to those charges. The Eleventh Circuit agreed with the district court that the conviction was not "presumptively invalid" and was therefore properly considered in the sentencing proceeding. The burden was on the defendant to lay a factual foundation for collateral review on the grounds that the state conviction was presumptively invalid, which he did not do.

§4A1.2 Definitions and Instructions for Criminal History

United States v. Bankston, 121 F.3d 1411 (11th Cir. 1997), *cert. denied*, 522 U.S. 1067 (1998). The district court did not err in concluding that a prior felony conviction based on a plea of guilty but mentally ill (GBMI), pursuant to Georgia law, can be used as predicate offense to establish career offender status under sentencing guidelines. The court of appeals examined Georgia law and found that a conviction based on the GBMI plea has the same force and legal effect as a conviction established by a plea of guilty and is therefore is a "guilty plea" within the meaning of §4A1.2(a)(4) of the guidelines.

Castillo v. United States, 200 F.3d 735 (11th Cir.), *cert. denied*, 531 U.S. 845 (2000). The district court correctly refused to recalculate the defendant's criminal history points after his prior state conviction had been reversed and subsequently *nolle prossed*. The circuit court held

that although the guidelines state that sentences which result from convictions that have been reversed, vacated, or ruled unconstitutionally invalid are not to be counted pursuant to §4A1.2, the state court's reversal of the defendant's conviction was not based on his innocence. Therefore, the defendant's prior conviction fell under the section of the guideline which states that convictions set aside "for reasons unrelated to innocence or errors of law" are to be counted.

United States v. Gass, 109 F.3d 677 (11th Cir. 1997). The district court relied on the defendant's prior juvenile conviction and sentence to increase the defendant's criminal history score. The defendant argued that he should not have been assessed an additional three criminal history points for several prior bank robbery convictions because the Federal Youth Corrections Act (FYCA) set aside and "expunged" the convictions pursuant to §4A1.2(j). The circuit court rejected the defendant's argument and affirmed, holding that section 5021(a) of the FYCA did not entitle a defendant to have a conviction record expunged or destroyed. Additionally, the circuit court refused to find that section 5021(a)'s "set aside" provision was synonymous with §4A1.2(j)'s "expungement" reference.

United States v. Gray, 367 F.3d 1263 (11th Cir. 2004). The defendant argued that the district court improperly included an uncounseled misdemeanor conviction in determining his criminal history. The district court had determined that the defendant had waived his right to counsel. The Eleventh Circuit ruled that the district court properly found that the defendant waived his right to counsel where the state court records conclusively established that the defendant executed a waiver of counsel and entered a plea to the charge.

United States v. Hernandez-Martinez, 382 F.3d 1304 (11th Cir. 2004). The defendant asserted that the district court, in computing his criminal history, should have counted his two prior state felony convictions as a single conviction. The offenses were not separated by an intervening arrest, and the defendant pleaded *nolo contendere* to the offenses on same day before same judge and was sentenced to concurrent sentences. The offenses did, however, occur on different days and involved different victims. There was no formal consolidation order, the cases were assigned different docket numbers, the defendant received separate judgments, and he was represented by two different attorneys at sentencing. Given these facts, the Eleventh Circuit held that the district court did not clearly err in concluding that defendant's offenses were not related for purposes of criminal history calculation.

United States v. Pielago, 135 F.3d 703 (11th Cir. 1998). The district court erred in counting the defendant's 1986 six-month sentence to a community treatment center as a "sentence of imprisonment" under §4A1.1(b). The circuit court concluded that a term of confinement in a community treatment center, like residency in a halfway house, is not a sentence of imprisonment.

United States v. Shazier, 179 F.3d 1317 (11th Cir. 1999). The defendant served six months' imprisonment for cocaine possession in Louisiana and a term of probation. After his probation expired, the defendant received a first-offender pardon from the state. The district court added two points to the defendant's criminal history, pursuant to §4A1.1(b), for the six-month sentence. The defendant argued that the state pardon for this offense amounted to a

“diversionary disposition” under §4A1.2(f) for which only one point should have been added to his criminal history. The Eleventh Circuit held that the “diversionary disposition” provision of the guidelines only applies to sentences not already counted in determining criminal history, and does not remove from consideration such sentences that are required to be counted. Since there is no indication in the guidelines that pardoned convictions are to be counted any differently than non-pardoned convictions and the six-month sentence was required to be counted under §4A1.1(b), the district court was correct in assessing the two points for the pardoned conviction.

United States v. White, 335 F.3d 1314 (11th Cir. 2003). The defendant gave a false name to an officer, after refusing to give his name to INS agents, and later pled guilty in state court to giving the police false information. He was then convicted in federal court of being in the United States illegally. At his sentencing hearing, the defendant objected to the assessment of two criminal history points for the false-information conviction, arguing that the conduct underlying that conviction was part of the relevant conduct for the instant offense. The district court concluded that the false-information conviction arose from “separate conduct” under §4A1.2. The Eleventh Circuit found that the fact that the defendant initially refused to give his real name to the INS agents was strong evidence that he gave a false name to local authorities to avoid detection for violating federal immigration laws. Consequently, the district court erred when it applied §4A1.2 and held that the false information conviction arose from separate conduct.

§4A1.3 Departures Based on Inadequacy of Criminal History Category (Policy Statement)

United States v. Dixon, 71 F.3d 380 (11th Cir. 1995). In an issue of first impression, the circuit court held that sentencing courts need not make step-by-step findings en route to the ultimate sentencing range when the court, pursuant to §4A1.3 departs above Criminal History Category VI. The court concluded that because the guidelines provide no objective criteria for determining how far down the offense level axis the sentencing court need travel in order to reflect accurately the defendant's criminal history above category VI, the sentencing court must have discretion to determine the offense level that will correspond to the appropriate sentencing range for a given defendant. Criminal history departures above category VI will be reviewed for reasonableness, based on findings as to why an upward departure is warranted and why the particular sentencing range chosen is appropriate.

United States v. Hernandez, 160 F.3d 661 (11th Cir. 1998). The defendant was convicted of concealing assets after seeking bankruptcy relief for himself and his two businesses. As one basis for an upward departure, the district judge cited the defendant’s failure to abide by an administrative settlement agreement arising out of claims that he failed to pay his employees minimum wage and overtime in violation of the Fair Labor Standards Act. The Eleventh Circuit rejected the defendant’s contention that “similar misconduct” must be criminal misconduct and held that the sentencing court did not abuse its discretion by concluding that the misconduct underlying the violation of the administrative settlement agreement was fraudulent in nature making it similar to the fraudulent conduct underlying the offense of conviction.

United States v. Hunerlach, 258 F.3d 1282 (11th Cir. 2001). In the defendant's tax evasion case, the district court upwardly departing from Criminal History Category I to Criminal History Category III, based on criminal conduct that constituted relevant conduct already considered by the district court in calculating the defendant's base offense level. The district court decided that while the 1988 prior conviction must be excluded from determining the criminal history category (CHC), it could be considered for the purposes of departing from the guidelines under §4A1.3. On appeal, the defendant challenged this criminal history departure on the grounds that the conduct involved in the prior conviction was part of the "relevant conduct" of the instant offense. The court held that when a district court determines that the conduct underlying a conviction is relevant conduct to the instant offense, and considers it as a factor in calculating the base offense level, it cannot then be simultaneously considered as a "prior sentence" under §4A1.3 for purposes of a criminal history departure.

United States v. Jones, 289 F.3d 1260 (11th Cir.), *cert. denied*, 537 U.S. 1049 (2002). The defendant appealed an upward departure based upon the failure of his criminal history category to adequately reflect the seriousness of his past criminal conduct and the likelihood of recidivism. Reviewing uncounted juvenile adjudications, the Eleventh Circuit ruled that the district court did not abuse its discretion in considering the defendant's juvenile record to determine that upward departure was warranted.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court did not err in departing upward on the defendant's offense level because the criminal history category of VI did not adequately reflect the seriousness of his criminal history. The defendant had a total of 40 criminal history points, 27 more than necessary to put him in category VI.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The district court relied upon an over-represented criminal history to justify a six-level vertical downward departure. The district court departed vertically because §4B1.1 mandates that a career offender shall be Category VI without regard to the seriousness of the prior offenses. The Eleventh Circuit reversed, holding that criminal history departures are governed by §4A1.3 and not the general departure guideline, 5K2.0. Section 4A1.3 departures must be on the horizontal axis, reflecting the offender's criminal history category, and not on the vertical axis. The facts did not support the finding that the defendant's criminal history significantly over-represented the seriousness of the defendant's record.

See United States v. Webb, 139 F.3d 1390 (11th Cir. 1998), §4B1.1, p. 45, *infra*.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Duty, 302 F.3d 1240 (11th Cir. 2002). The district court did not err in sentencing the defendant as a career offender. The defendant had four prior felony drug convictions for which he entered guilty pleas in state court. He argued on appeal that the four prior convictions should be treated as one conviction pursuant to a Georgia statute, O.C.G.A.

§17-10-7(d), which requires that “conviction of two or more crimes charged on separate counts of one indictment or two or more incidents be consolidated for trial.” The court determined that since the proper definition of “conviction” as used in §4B1.1 was governed by the federal and not state law, the Georgia statute did not apply to the defendant’s sentence. Further, under §4A1.2, Note 3, since the defendant’s prior state drug offenses were separated by intervening arrests, they were unrelated for sentencing purposes and thus should be treated as separate prior convictions for career offender purposes.

United States v. Gay, 251 F.3d 950 (11th Cir. 2001). The Eleventh Circuit found that a state conviction for prior felony escape was properly treated as a crime of violence under section 4B1.2 for career offender purposes, even though the escape involved simply walking away from a non-secure facility. An escape conviction is an offense that involves conduct that presents a potential risk of physical injury to another because “even the most peaceful escape cannot eliminate the potential for violent conflict when the authorities attempt to recapture the escapee.”

United States v. Gilbert, 138 F.3d 1371 (11th Cir. 1998), *cert. denied*, 526 U.S. 1111 (1999). The district court did not err in sentencing the defendant as a career offender after finding that carrying a concealed firearm in violation of Florida law is a predicate “crime of violence.” The court of appeals held that carrying a concealed weapon “presents a serious potential risk of physical injury” under §4B1.2(1).

United States v. Gonsalves, 121 F.3d 1416 (11th Cir. 1997), *cert. denied*, 522 U.S. 1067 (1998). The district court did not err in sentencing the defendants as career offenders based on prior state convictions. The defendants argued that the Commission went beyond the statutory authority in 28 U.S.C. § 994(h) by including state court convictions in this guideline. The court held that §4B1.1 does not exceed its statutory authority by including state court convictions in addition to federal convictions as permissible predicate offenses for career offender enhancement. If Congress had wanted only convictions under particular federal statutes to serve as predicate offenses, it could have said so quite simply. Instead, Congress referred to “offenses described in”—not “convictions obtained under”—those statutes.

United States v. Jackson, 199 F.3d 1279 (11th Cir.), *cert. denied*, 529 U.S. 1120 (2000). The district court did not err in finding defendant’s prior offense of possession of a fire bomb with intent to willfully damage any structure or property was a crime of violence under §4B1.2 because the offense entailed conduct that “presents a serious potential risk of physical injury to another.” The defendant argued the crime was not a crime of violence because it did not involve any threat to another person. The circuit court agreed the crime fit the definition because even if the structure or property were uninhabited, there was inherent risk to firefighters and innocent bystanders if the fire spread to occupied structures.

United States v. Jeter, 329 F.3d 1229 (11th Cir. 2003). On appeal, the defendant argued that, pursuant to the rule of lenity, the district court should have granted him a minor role adjustment under §4B1.1. The Eleventh Circuit noted that the rule of lenity did not apply. The court held that minor role adjustments were not available to defendants under §4B1.1.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The rule that criminal history downward departures are limited to horizontal departures applies to career offender defendants.

United States v. Webb, 139 F.3d 1390 (11th Cir. 1998). The district court erred in concluding that it lacked the authority to grant a downward departure with respect to a defendant classified as a career offender. The court of appeals held that §4A1.3, which authorizes an upward or downward departure when the criminal history category does not adequately reflect the seriousness of defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, also authorizes a downward departure when the defendant's classification as a career offender overstates the seriousness of his criminal history.

§4B1.2 Definitions of Terms Used in Section 4B1.1

United States v. Gunn, 369 F.3d 1229 (11th Cir.), *cert. denied*, 125 S. Ct. 324 (2004). The defendant challenged his classification as a career offender under §4B1.2(a)(2) because the district court interpreted attempted burglary as a "crime of violence." Section 4B1.2(a)(2) defines burglary as a crime of violence and the defendant argues that this is different from attempted burglary. The court of appeals ruled that an uncompleted burglary does not diminish the potential risk of physical injury and upheld the classification of the defendant as a career offender.

§4B1.4 Armed Career Criminal

United States v. Burge, 407 F.3d 1183 (11th Cir. 2005). The district court sentenced the defendant as an Armed Career Criminal under 18 U.S.C. § 924(e) based on its finding that his juvenile conviction of burglary in the first degree constituted a predicate violent felony. The Eleventh Circuit held that the district court properly considered the petition and judgment of the juvenile adjudication to determine whether the juvenile adjudication could count as a predicate conviction. A prior non-jury juvenile adjudication that was afforded all constitutionally required procedural safeguards can properly be characterized as a prior conviction.

United States v. Cobia, 41 F.3d 1473 (11th Cir.), *cert. denied*, 514 U.S. 1121 (1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to 18 U.S.C. § 924(e) even though the government did not affirmatively seek such an enhancement. The defendant contended that the government must affirmatively seek the enhancement for a court to apply section 924(e) and that the application of section 924(e) was not mandatory. The circuit court rejected this argument and held that the plain language of section 924(e) establishes that the enhancement is mandatory. The circuit court joined the First and Tenth Circuits in holding that upon reasonable notice to the defendant and an opportunity to be heard, the section 924(e) enhancement should automatically be applied by courts to qualifying defendants regardless of whether the government affirmatively seeks such an enhancement.

United States v. Lyons, 403 F.3d 1248 (11th Cir. 2005). The defendant was convicted of being a felon in possession of ammunition. The defendant argued that his 235-month sentence constituted cruel and unusual punishment, in violation of the Eighth Amendment. The Eleventh

Circuit upheld the sentence, reasoning that recidivism has long been recognized as a legitimate basis for increased punishment. The defendant's category VI criminal history and the heightened total offense level required by §4B1.4(b) resulted in a guidelines sentencing range of 235 to 293 months. This sentence was entirely the result of the defendant's recidivism. It is well-settled law that a longer sentence may be imposed on a recidivist, based on his criminal history, even if the offense of conviction is relatively minor in nature. In short, under controlling Supreme Court precedent, the court found no Eighth Amendment violation.

McCarthy v. United States, 135 F.3d 754 (11th Cir.), *cert. denied*, 525 U.S. 1009 (1998). The district court found that the defendant's prior Florida drug convictions qualified as predicate "serious drug offenses" under 18 U.S.C. § 924(e), so as to subject him to a mandatory minimum as an Armed Career Criminal. The defendant argued that, to determine whether his prior convictions were serious drug offenses, the court should have used the Florida guidelines' presumptive sentence range for each of the prior convictions, which was between three and one-half and four and one-half years, instead of the statutory maximum penalties. The court of appeals rejected the argument, finding that the district court properly considered the statutory maximum penalties.

United States v. Mellerson, 145 F.3d 1255 (11th Cir. 1998). The district court set the defendant's base offense level at 34 under the Armed Career Criminal provision, §4B1.4(b)(3)(A), even though the defendant had not actually been convicted of a crime of violence while he possessed the firearms. The defendant did not contest that he committed the aggravated assault and armed burglary and that those were crimes of violence, but argued that because he had not been convicted of the offenses, they should not be considered in sentencing him. The court of appeals rejected this argument, holding that as long as the government proves by a preponderance of the evidence that a crime of violence was committed in connection with the firearms possession, §4B1.4(b)(3)(A) applies regardless of whether the connected crimes led to a conviction. The court reasoned that the guideline states that 34 is the proper offense level "if the defendant used or possessed the firearm . . . in connection with a crime of violence" and does not mention a conviction.

United States v. Rucker, 171 F.3d 1359 (11th Cir.), *cert. denied*, 528 U.S. 976 (1999). The defendant, charged with various drug offenses, had state convictions which both the government and defendant agreed qualified as predicates under the Armed Career Criminal statute, 18 U.S.C. § 924(e). The district court, deeming the defendant to be just a small-time street dealer, concluded that the convictions were very minor and, on that basis, departed downward by three criminal history categories. On appeal, the Eleventh Circuit held that the district court erred in looking behind the drug convictions that qualified as "serious drug offense[s]" under the Armed Career Criminal statute and concluding that the offenses were so minor as to justify a downward departure. The court found that it would make no sense to conclude that a sentencing court may not look behind the fact of an unambiguous judgment in determining whether a prior conviction serves as a predicate serious drug offense but may do so to conclude whether a downward departure is warranted.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Acosta, 287 F.3d 1034 (11th Cir.), *cert. denied*, 537 U.S. 926 (2002). The district court did not err in finding that the defendant was not entitled to "safety valve" relief. There was no error in the district court's conclusion that the defendant did not satisfy his burden or persuasion to convince the court that he had provided truthful and complete information.

United States v. Anderson, 200 F.3d 1344 (11th Cir. 2000). The district court correctly found the safety valve provision inapplicable to a defendant convicted for possession with intent to distribute crack cocaine within 1,000 feet of a public elementary school, even though the conviction included a violation of a possession statute to which the safety valve provision applied. The defendant pled guilty to violating 18 U.S.C. § 860, which necessarily includes a violation of section 841(a) or section 856. He argued that even though section 860 does not trigger the safety valve, because he was also convicted under section 841, he was entitled to application of the provision. The circuit court held because the provision only applies to five statutes and does not include section 860, a defendant convicted and sentenced under this section is not eligible for application of the provision.

United States v. Bravo, 203 F.3d 778 (11th Cir.), *cert. denied*, 531 U.S. 994 (2000). On his first appeal, the defendant claimed the district court erred by concluding that it lacked authority to depart from the guidelines or to apply the safety valve provision of §5C1.2. The defendant had been convicted of conspiracy to import cocaine, and subsequent to his incarceration, Congress amended §2D1.1 and enacted §5C1.2. Upon rehearing, the sentencing court granted him the benefit of the §2D1.1 amendment, but did not apply the safety valve provision because it was not included in the list of amendments which may be applied retroactively under §1B1.10(c). The safety valve provision only applies where application of the guideline would result in imposition of a sentence lower than the statutory minimum of ten years. Because the defendant's revised sentence after application of the §2D1.1 amendment was 168 months, the circuit court found whether the district court had jurisdiction to apply the safety valve provision was irrelevant.

United States v. Brownlee, 204 F.3d 1302 (11th Cir. 2000). The district court erred in finding that the defendant's prior failure to truthfully disclose information related to his offenses precluded application of the safety valve provision. The Eleventh Circuit stated that §5C1.2 provides only one deadline for compliance and nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from relief. Therefore, a defendant's lies and omissions will not, as a matter of law, disqualify him from safety valve relief so long as he makes a complete and truthful proffer no later than the commencement of the sentencing hearing. The court remanded the case for a determination by the district court on the factual question of whether the defendant's final proffer was complete and truthful.

United States v. Clavijo, 165 F.3d 1341 (11th Cir. 1999). The defendant was part of a drug conspiracy and was subject to a five-year mandatory minimum sentence, under 18 U.S.C. § 841(b)(1)(B)(vii). His base offense level was enhanced pursuant to §2D1.1(b)(1) on the basis of a co-conspirator's possession of a firearm at one of the other grow houses. Despite the enhancement, his guidelines sentence would still have been below the statutory mandatory minimum. The sentencing judge held that the application of the §2D1.1(b)(1) firearm enhancement precluded the application of the "safety valve" provision to the defendant because he could not satisfy the no-firearms requirement of §5C1.2. The Eleventh Circuit disagreed and held "possession" of a firearm for purposes of the safety valve provision does not include the reasonably foreseeable possession of a firearm by a co-conspirator that is sufficient to trigger the §2D1.1(b)(1) enhancement. First, Application Note 4 to §5C1.2 specifically limits the defendant's accountability to his or her own actions and conduct that the defendant aided or induced. Second, if "possession" in §5C1.2 encompassed constructive possession by a co-conspirator, the safety valve provision's "induce another participant to [possess]" would be unnecessary.

United States v. Figueroa, 199 F.3d 1281 (11th Cir. 2000). The district court improperly applied the safety valve provision for a defendant who did not make a complete and truthful disclosure of her knowledge of the crime. The district court made statements clearly indicating it was not prepared to accept everything in the defendant's statement and that it found her disclosures incomplete and untruthful but applied the provision because "it apparently considered absence of knowledge on . . . critical points the government [wa]s interested in enough to apply the safety valve." The Eleventh Circuit held that the guideline does not permit a sentencing court to make any determination of the possible utility of the information possessed by the defendant.

United States v. Garcia, 405 F.3d 1260 (11th Cir. 2005). The defendant sought a safety valve adjustment and submitted it to debriefings before the sentencing. At sentencing, however, it became apparent to the defendant that he had not completely debriefed to the satisfaction of the government and he moved for a continuance of the sentencing. Believing that it lacked authority to continue the sentencing, the court declined his request for a continuance, and, ultimately, declined to give him safety-valve relief due to his failure to completely debrief prior to the commencement of sentencing. The Eleventh Circuit reversed, holding that a district court may continue a sentencing hearing to give a defendant an opportunity to debrief for the purpose of considering safety-valve relief, if the district court determines that the factual circumstances warrant a continuance. The court found that the circumstances in this case established good cause for the continuance. The defendant, a first time drug offender, spoke no English, and all translation was performed by an agent rather than an independent translator. Second, his counsel erroneously believed that the defendant had already made a sufficient statement to qualify for the safety-valve and that he had been assured by the government agents that they would follow up with additional debriefings. Third, and perhaps most importantly, there was no evidence that the defendant's failure to fully debrief prior to the commencement of the sentencing hearing was an attempt to mislead, manipulate, stall or delay.

United States v. Johnson, 375 F.3d 1300 (11th Cir. 2004). The defendant was convicted of cultivating 273 marijuana plants. At a debriefing session, he gave authorities a detailed

analysis of cultivating marijuana. He refused to divulge information about the intended distribution of the marijuana he was growing, contending that information about distribution was unrelated to his offense of cultivation. After being denied a safety valve reduction, the defendant appealed. He argued that he provided all the information necessary because the scope of information he was required to disclose was properly defined with reference to the crime of cultivation. The Eleventh Circuit disagreed. Given the large number of plants, the district court reasonably inferred that he was growing the marijuana for distribution and properly determined that information about the intended distribution was related to the defendant's offense of conviction. Thus, the court did not err by finding that Johnson failed to satisfy the full scope of disclosure required by the safety-valve provisions.

United States v. Orozco, 121 F.3d 628 (11th Cir. 1997). The district court did not err in sentencing the defendant to the statutory minimum without applying the safety valve. When the defendant has more than one criminal history point, the safety valve is unavailable, even though the defendant's criminal history category is Category I.

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

United States v. Giraldo-Prado, 150 F.3d 1328 (11th Cir. 1998). The district court erred in ordering judicial deportation as a condition of supervised release. The defendant's failure to object to the district court's lack of subject matter jurisdiction to order her deportation could not waive the issue, because subject matter jurisdiction is never waived.

United States v. Okoko, 365 F.3d 962 (11th Cir. 2004). The district court tolled the term of supervised release period while the defendant was legally outside of the country. In 18 U.S.C. § 3624(e), Congress authorized the tolling of a period of supervised release in two circumstances: when the person is in prison for another crime, and for a violation of a supervised release before it expires. Congress did not include the period of time when the probationer is outside the country as a circumstance for tolling a period of supervised release. As a result, the district court did not have the authority to order the tolling of the term of supervised release and therefore did not have jurisdiction to find the defendant violated his supervised release.

United States v. Romeo, 122 F.3d 941 (11th Cir. 1997). The district court erred in requiring the defendant's deportation as a condition of supervised release. The court of appeals held that 8 U.S.C. § 1229(a), the newly enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), eliminated the district court's jurisdiction to order judicial deportation pursuant to 18 U.S.C. § 3583(d). The IIRAIRA provides that a hearing before an immigration judge is the exclusive procedure for determining whether an alien may be deported. Thus, section 3583(d) authorizes a district court to order that a defendant be surrendered to the INS for deportation proceedings in accordance with the Immigration and Naturalization Act, but it does not authorize a court to order a defendant deported. The court also held that the statutory change is applicable to all pending cases.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Fuentes, 107 F.3d 1515 (11th Cir. 1997). The district court ordered restitution in the amount of \$357,281 even though the defendant was indigent and not capable of making restitution in the full amount. In determining whether to order restitution and the amount, the sentencing court should consider the amount of loss sustained by any victim as a result of the offense, the financial resources of the defendant, and the financial needs and earning ability of the defendant and the defendant's dependants. The record revealed that both the prosecutor and the defense attorney agreed that the defendant was indigent and could not pay restitution at the time of sentencing. The appellate court held that although a sentencing court may order restitution even if the defendant is indigent at the time of sentencing, it may not order restitution in an amount that the defendant can never repay. Thus, the district court abused its discretion in ignoring the testimony concerning the defendant's financial resources and the defendant's ability to pay after release.

United States v. Logal, 106 F.3d 1547 (11th Cir.), *cert. denied*, 522 U.S. 953 (1997). The district court did not err in voiding the defendant's restitution order because the defendant committed suicide prior to his incarceration. In keeping with Eleventh Circuit precedent, the court adhered to the general rule that the death of a defendant during the pendency of his direct appeal renders both his conviction and sentence, including any restitution order, *void ab initio*.

United States v. McArthur, 108 F.3d 1350 (11th Cir. 1997). The defendant was convicted of possessing a firearm in a federal facility and acquitted of the charge of assault with intent to commit murder, based on the shooting of a man he allegedly shot in self-defense. The district court ordered the defendant to pay restitution to cover medical costs of the individual he shot. The government contended that this was permissible because sentencing judges may consider relevant conduct, even if the defendant is not found guilty beyond a reasonable doubt of that conduct. The circuit court rejected this argument. The Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3579-3580, prohibits restitution orders from considering harms arising from conduct for which the defendant was acquitted. The circuit court also rejected the government's reliance on cases holding that a sentencing court may consider acquitted conduct, stating that such cases are based on a sentencing court's powers, rather than the VWPA's scope as to authority to impose restitution.

§5E1.2 Fines for Individual Defendants

United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996). The district court erred in ordering that if the defendant served his full prison sentence, his fine would be waived. On appeal, the court held that the sentencing guidelines, with limited exceptions, require the imposition of a fine in all cases. The court noted that there is no exception in the guidelines for the expiration of a fine based on the defendant's service of his full term of incarceration. As a result, the court of appeals could find no support for the district court's decision.

United States v. Price, 65 F.3d 903 (11th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996). In a matter of first impression, the Eleventh Circuit held that §5E1.2, which imposes fines to pay for incarceration costs, is rationally related to the Sentencing Reform Act. The uniform practice of fining criminals on the basis of their individualistic terms of imprisonment—an indicator of the actual harm each has inflicted upon society—is a rational means to assist the victims of crime collectively.

Part G Implementing the Total Sentence of Imprisonment

§5G1.1 Sentencing on a Single Count of Conviction

United States v. Clark, 274 F.3d 1325 (11th Cir. 2001). Pursuant to statute, the defendant was subject to a mandatory minimum sentence of 20 years. The guideline sentencing range was calculated to be 168-210 months. The district court imposed a 150-month sentence. The Eleventh Circuit reversed, finding plain error. Section 5G1.1(c)(2) provides, "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Davis, 329 F.3d 1250 (11th Cir.), *cert. denied*, 540 U.S. 925 (2003). The district court interpreted §5G1.2(d) to require that defendants' sentences run consecutively rather than concurrently so that the appropriate guidelines range could be achieved. On appeal, the defendants argued that the sentencing guidelines required the court to impose a concurrent sentence where the total punishment imposed on the 21 U.S.C. § 841 count was less than or equal to the highest statutory maximum. *See* §5G1.2(c). The defendants contended that sentencing courts were authorized to exercise alternative sentencing configurations to avoid manifest injustice and prejudice to the defendants. The Eleventh Circuit noted that it had never directly addressed the issue of whether a district court retains the discretion to sentence a defendant to concurrent terms of imprisonment when §5G1.2(d) calls for consecutive terms of imprisonment. The court joined the majority of its sister circuits and held that the imposition of consecutive sentences under §5G1.2(d) was mandatory.

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. Bidwell, 393 F.3d 1206 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1956 (2005). The defendant sexually abused his daughter. He also filmed that abuse, and distributed those films. He was prosecuted in both state and federal court. For the sexual abuse, a Georgia state court sentenced the defendant to 30 years' imprisonment. For filming and distributing the films of that abuse, the district court sentenced the defendant to 15 years' imprisonment, which the court ordered to run consecutively to his state sentence. The defendant challenged his sentence on appeal, arguing that under §5G1.3, the district court erred in ordering his federal sentence to run consecutively—rather than concurrently—to his state sentence. The Eleventh Circuit held that §5G1.3(b) did not apply to the defendant because his state and federal crimes

were substantively different. The videotaping of sexual abuse of a minor is a different crime than the sexual abuse itself. Therefore, the state sentence was not fully taken into account when calculating the applicable offense level for the federal crime and the court had the discretion to impose consecutive sentences.

United States v. Bradford, 277 F.3d 1311 (11th Cir.), *cert. denied*, 537 U.S. 918 (2002). The Eleventh Circuit did not find reversible error where the district court refused to run a new sentence for an escape conviction concurrent with the sentence imposed for a prior conviction for another escape. The court determined that neither §5G1.3(a) or (b) applied. Thus, the district court had discretion to impose a consecutive sentence to achieve reasonable punishment, pursuant to §5G1.3(c).

Part K Departures

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Crawford, 407 F.3d 1174 (11th Cir. 2005). A sentencing court cannot depart from an advisory guidelines range for substantial assistance absent a motion from the government. Absent such a motion, the defendant's assistance is not a permissible ground for a departure in calculating the advisory guideline range.

United States v. Nealy, 232 F.3d 825 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001). The government did not violate the defendant's due process rights when it did not file a motion to depart based on substantial assistance. Although the government conceded that the defendant had provided substantial assistance by participating in controlled drug buys and testifying against his supplier who was ultimately convicted, he was arrested for possession with intent to distribute cocaine base after testifying against his supplier. The defendant argued that the government could not refuse to file a §5K1.1 motion for "reasons other than the nature of [his] substantial assistance." The Eleventh Circuit rejected this contention as contrary to circuit precedent and the broad grant of prosecutorial discretion recognized by the court. Review of the government's refusal to file a §5K1.1 motion is limited to claims of unconstitutional motive. Because the defendant had not alleged an unconstitutional motive, the court affirmed.

§5K1.2 Refusal to Assist (Policy Statement)

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001). The court stated that §5K1.2 prohibits upward departures based on the refusal to cooperate. Such refusal, however, can be considered when determining the sentence within the applicable guideline range.

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Allen, 87 F.3d 1224 (11th Cir. 1996). Upon the Government's cross-appeal, the appellate court held that the defendant's responsibilities as primary (but not sole) caretaker of her 70-year-old father who suffers from Alzheimer's and Parkinson's diseases were not so extraordinary as to warrant a downward departure from the guidelines under §5K2.0.

Family circumstances do not ordinarily justify a downward departure. The appellate court acknowledged the district court's unique "feel for the case," but noted that unfettered discretion by district court judges would lead to sentencing disparity.

United States v. Hoffer, 129 F.3d 1196 (11th Cir. 1997). The district court erred in departing downward based on the defendant's civil forfeiture and his loss of his license to practice medicine. The defendant's agreement in plea bargain not to contest the government's subsequent civil forfeiture action seeking \$50,000 from the defendant as proceeds of his illegal drug activities was a prohibited factor that could not be the basis for downward departure under the sentencing guidelines. The defendant's loss of his privilege to practice medicine as part of the plea agreement was not a basis for downward departure when sentencing him for federal drug offenses, where defendant received a two-level sentence enhancement for using his special skills as a physician to facilitate commission of his crimes and for abusing the position of trust he held as a physician, and was able to commit his offenses because he had prescription writing authority.

United States v. Holland, 22 F.3d 1040 (11th Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). The defendant appealed from a civil judgment entered for his participation in a conspiracy to deprive certain individuals of their civil rights in violation of 42 U.S.C. § 1985. He filed perjured *in forma pauperis* papers, claiming that he did not own anything of value. He was subsequently indicted and convicted of several counts of criminal perjury. The district court departed downward *sua sponte* because it determined that §2J1.3 should not apply since the defendant's perjury stemmed from a civil proceeding. The circuit court held that the perjury statute, 18 U.S.C. § 1621, does not distinguish between perjury committed during civil or criminal proceedings. Accordingly, the defendant's offense conduct did not fall outside of the heartland of typical perjury offenses.

United States v. Kapelushnik, 306 F.3d 1090 (11th Cir. 2002). The district court granted a downward departure to the defendant due to the defendants' post-adjudication voluntary restitution of stolen coins. After examining the record, the court concluded that there was no evidence to support that the defendants were responsible, either directly or indirectly, for the return of stolen coins. Therefore, a downward departure was not warranted.

United States v. Miller, 78 F.3d 507 (11th Cir. 1996). The district court granted the defendant a seven-level downward departure on the grounds that the Commission failed to adequately consider the impact of §2S1.2(a) upon an attorney who derives knowledge of the source of the criminally derived property through a legitimate attorney-client relationship. *See* §5K2.0. The circuit court vacated the sentence due to the insufficient factual findings supporting the departure and remanded with instructions for the district court to explicitly make factual findings as to the circumstances warranting a departure, to state whether these circumstances are considered by the guidelines and are consistent with the guidelines goals, and if a departure is deemed appropriate, to state reasons justifying the extent of the departure.

United States v. Miller, 71 F.3d 813 (11th Cir.), *cert. denied*, 519 U.S. 842 (1996). The district court improperly departed downward by sentencing the defendant for conspiring to

possess powder cocaine rather than crack, which was the substance delivered and charged in the indictment. The defendant argued that he was "trapped into supplying crack." The circuit court stated that the district court made no findings, and a careful review of the record did not reveal any mitigating circumstances justifying downward departure under §5K2.0. Furthermore, the court rejected the defendant's entrapment argument and noted that sentencing entrapment is a defunct doctrine. The circuit court concluded that departure from the recommended sentencing range was neither reasonable nor consistent with the guidelines.

United States v. Saucedo-Patino, 358 F.3d 790 (11th Cir. 2004). Following his deportation from the country after being convicted on a felony charge of burglary in a habitation with intent to commit aggravated assault, the defendant reentered the United States without authorization, only to be caught. At sentencing, the district court granted the defendant an eight-level downward departure under §5K2.0. The government appealed. The issues on appeal were whether the district court possessed authority to depart downward eight or more levels based on the nature of the underlying offense; whether the defendant's employment history and family responsibilities were outside the heartland, and whether the defendant's motive for reentering the country was relevant to the determination to depart. First, the court noted that a sentencing court lacks the authority to treat a crime of violence as if it were not, in fact, a crime of violence. In other words, a sentencing court was categorically prohibited from departing downward where its only basis for doing so was the nature of the underlying offense. The court then noted that the guidelines expressly stated that employment history and family responsibilities were not usually relevant in determining whether a sentence should fall outside the usual guideline range. In the instant case, there was no specific aspect of defendant's employment history or family responsibilities that was so exceptional as to take this case outside the heartland. Finally, the defendant's argument that his motive for reentering the United States—supporting his family—did not involve an intent to commit further crimes and that it was appropriate for the district court to take this motive into account was without merit. The court noted that the defendant's motive for reentering was irrelevant. All that matters in the instant case was that defendant entered without permission after being convicted of a felony. The court concluded that none of the factors used by the district court in formulating its downward departure could serve as a basis for a departure.

United States v. Searcy, 132 F.3d 1421 (11th Cir. 1998). The district court did not err in refusing to depart to reflect the theoretical sentence the defendant might have received had prosecution occurred in state court. The circuit court reasoned that allowing departure because the defendant could have been subjected to lower state penalties would undermine the goal of uniformity which Congress sought to ensure, as federal sentences would be dependent on the practice of the state within which the federal court sits.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). Under §5K2.0, a combination of factors, taken together, may take a case outside the heartland, thus warranting departure. Here, however, each of the factors identified by the district court to justify its downward departure were impermissible grounds for departure under §5K2.0. Therefore, these impermissible factors cannot combine to warrant a departure.

United States v. Stuart, 384 F.3d 1243 (11th Cir. 2004). The district court departed downward in part based upon the defendant's extraordinary post-offense rehabilitation. Ordinarily, post-offense rehabilitation is taken into account by the §3E1.1 acceptance of responsibility reduction. While truly extraordinary post-offense rehabilitation may exceed the degree of rehabilitation contemplated by §3E1.1 and therefore justify a downward departure, any departure must occur along the horizontal axis for criminal history. Because the defendant was already in the lowest possible criminal history category on the horizontal axis, the court ruled that he was not eligible for a departure for post-offense rehabilitation.

A downward departure for preindictment delay has to be predicated on some prejudice to the defendant. Where the record did not demonstrate any evidence of prejudice to the defendant from any delay, the district court erred in departing downward for preindictment delay.

United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998). The district court erred in granting a three-level downward departure for "cultural differences." The defendant, a Japanese national, was convicted of illegally importing turtles and snakes. He moved for a departure, alleging that because of the cultural differences between the United States and Japan, he was unaware of the serious consequences of his actions, and that these differences constituted a factor not taken considered by the Sentencing Commission. The court of appeals found these grounds insufficient to take the case out of the heartland. The fact that the animals may or may not be endangered is already considered in the guideline. The guidelines that apply to illegal importation of wildlife necessarily contemplate that a portion of illegally imported wildlife will be imported by people from other countries, many of whom will have an imperfect understanding of United States customs law.

United States v. Willis, 139 F.3d 811 (11th Cir. 1998). The district court erred in departing downward in order to reconcile the disparity between federal and state sentences among codefendants. The court of appeals noted that permitting departure based on a codefendant's sentence in state court would create system-wide disparities among federal sentences.

§5K2.5 Property Damage or Loss (Policy Statement)

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), *cert. denied*, 516 U.S. 1166 (1996). The defendant was convicted of conspiracy to commit mail and wire fraud and wire fraud stemming from the operation of a loan brokerage firm. The district court erred in departing upward based on the consequential financial damages to the victims beyond the amount they paid in advance fees to the defendant. The defendants argued on appeal that consequential damages should not have been used as a basis for upward departure because those damages were adequately considered in establishing the defendant's guideline range. The circuit court agreed, ruling that the Sentencing Commission had expressly considered and rejected consequential damages as a factor in determining offense levels under the guidelines, except for government procurement and product substitution cases. The court noted that if the consequential damages in this case were "substantially in excess" of what ordinarily is involved in an advance fee scheme case, then a departure may be warranted but then ruled that the consequential damages in this case did not warrant an upward departure.

§5K2.7 Disruption of Governmental Function (Policy Statement)

United States v. Regueiro, 240 F.3d 1321 (11th Cir. 2001). The defendant pled guilty to conspiracy to defraud the United States, conspiracy to commit money laundering, and money laundering. The district court departed upward four levels when it concluded that the nature and scope of the defendant's conduct significantly disrupted the government's provision of Medicare benefits. The value of the laundered funds totaled over three million dollars. The Eleventh Circuit found the defendant's conduct disrupted governmental function because every time one of the nurses from the 100 groups he organized fraudulently billed Medicare, the government lost funds that it otherwise could have used to provide care to eligible patients.

§5K2.11 Lesser Harms (Policy Statement)

United States v. Rojas, 47 F.3d 1078 (11th Cir. 1995). The district court erred in granting a downward departure under §5K2.11 to a defendant convicted of knowing possession of unregistered firearms, based upon his claims that he was transporting the weapons to Cuba in order to avoid the greater harm of the total destruction of a country and the annihilation of its citizens. On appeal, the government argued that 26 U.S.C. § 5861 seeks to prevent the harms associated with the defendant's conduct and that the defendant's subjective views of foreign policy may not serve as a basis for a sentence reduction. The appellate court agreed that section 5861 was intended to reach the harms connected with the defendant's conduct, and that the downward departure was inappropriate. The appellate court noted that the defendant's conduct did not fall into the "traditional" departure categories for §5K2.11: hunting, sport shooting and protecting the home. The circuit court further ruled that the sentencing guidelines clearly indicate that a defendant is not entitled to a downward departure because of a personal belief that the criminal action is furthering a greater political good.

§5K2.13 Diminished Capacity (Policy Statement)

United States v. Miller, 146 F.3d 1281 (11th Cir. 1998), *cert. denied*, 525 U.S. 1127 (1999). The defendant pled guilty to transporting through a commercial computer service images depicting child pornography. The district court departed downward for diminished mental capacity based on the defendant's impulse control disorder. The court of appeals rejected the departure on several grounds. First, the facts of the case did not remove it from the heartland in that the harm in the offense is sustaining a market for child pornography, of which defendant was guilty. Second, according to the expert testimony presented, impulse control disorders are not unusual among those who collect child pornography, so this aspect of defendant's personality did not separate him from other defendants. Finally, §5K1.13 requires that the diminished capacity be linked to the commission of the offense. It appeared that, at most, the defendant's impulse disorder was related to his viewing of adult pornography, and that his offense conduct was no more related to the impulse disorder than if he had robbed someone in order to use the proceeds to purchase adult pornography. The testimony failed to link the disorder to the offense, so no §5K2.13 departure was appropriate.

United States v. Smith, 289 F.3d 696 (11th Cir. 2002). The district court departed downward based, in part, because it believed the defendant's judgment was impaired by a number of factors, including drug abuse, a low aptitude or learning disability leading to classification as a special education student, and early treatment for an emotional or mental disorder. The Eleventh Circuit reversed, explaining that these grounds are prohibited by §5H2.13 in all but extraordinary cases. The court concluded that the record was devoid of evidence that the defendant's drug addiction or mental and emotional condition made the case so extraordinary that it was outside the heartland. Moreover, §5K2.13 requires "significantly reduced" mental capacity to warrant such departure, and no such facts were in the record.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Maldonado-Ramirez, 216 F.3d 940 (11th Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001). The district court erred in imposing a condition of supervised release ordering the defendant not to seek relief from a deportation proceeding. The Eleventh Circuit held the district court lacked the authority to impose such a restriction because the Immigration Reform and Immigrant Responsibility Act divests the federal courts of jurisdiction in criminal proceedings to order deportation independently. Because preventing the defendant from raising a defense or challenging the government's case during a removal hearing would have much the same effect, the imposed condition was not proper.

United States v. Hurtado-Gonzalez, 74 F.3d 1147 (11th Cir.), *cert. denied*, 517 U.S. 1250 (1996). In considering an issue of first impression, the circuit court joined the Second Circuit in holding that in cases where the defendant's original sentence was for a preguidelines offense, the sentencing guidelines do not apply to sentencing following revocation of probation.

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Cook, 291 F.3d 1297 (11th Cir. 2002). The defendant argued that the district court erred by imposing a probation revocation sentence above the recommended imprisonment range in Chapter Seven of the *Guidelines Manual*. The Eleventh Circuit affirmed because 18 U.S.C. § 3553(a)(4)(B) requires a district court only to consider the Chapter Seven policy statements in determining a revocation sentence.

APPLICABLE GUIDELINES/*EX POST FACTO*

See United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997), §1B1.11, p. 4.

United States v. Diaz, 26 F.3d 1533 (11th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995). The defendant argued that the district court violated the *Ex Post Facto Clause* by refusing to grant him an acceptance of responsibility reduction based on the amended §3E1.1 commentary,

which took effect after he was convicted, but before he was sentenced. In rejecting this argument, the circuit court held that the commentary to §3E1.1 merely confirms this circuit's prior interpretation of §3E1.1; accordingly, it does not implicate *ex post facto* concerns.

CONSTITUTIONAL CHALLENGES

Eighth Amendment

See United States v. Lyons, 403 F.3d 1248 (11th Cir. 2005), §4B1.4, p. 46.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Jones, 143 F.3d 1417 (11th Cir. 1998). The district court's error in failing to advise the defendant at his Rule 11 plea colloquy of the statutory mandatory minimum penalties was harmless where a signed, written plea agreement describing a mandatory minimum sentence is specifically referred to during the plea colloquy.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 201(c)(2)

United States v. Lowery, 166 F.3d 1119 (11th Cir.), *cert. denied*, 528 U.S. 889 (1999). The Eleventh Circuit held that agreements in which the government trades sentencing recommendations or other official action or consideration for cooperation, including testimony, do not violate 18 U.S.C. § 201(c)(2), the statutory prohibition against bribing witnesses. The court noted that, if, as argued, the language of the statute did plainly provide that it is a crime for the government to trade leniency for testimony, the issue would have been raised early and often.

18 U.S.C. § 924(c)

See United States v. Bazemore, 138 F.3d 947 (11th Cir. 1998), §2K2.4, p. 21.

18 U.S.C. § 2326

United States v. White, 118 F.3d 739 (11th Cir. 1997). In a case of first impression, the Eleventh Circuit held that district courts cannot apply the sentencing guidelines of the Senior Citizens Against Marketing Scams Act (SCAMS Act), 18 U.S.C. § 2326, to increase criminal penalties for fraud prosecuted under an unlisted federal statute. The court refused to extend the SCAMS Act to apply to 18 U.S.C. § 2314 because Congress did not specifically list this statute under the SCAMS Act.

21 U.S.C. § 851

United States v. Brown, 47 F.3d 1075 (11th Cir. 1995). In deciding an issue of first impression in the Eleventh Circuit, the appellate court adopted the reasoning of four other circuits holding that 21 U.S.C. § 851 permits the government to seek an enhanced penalty (here, life imprisonment for a defendant guilty of a drug offense involving more than five kilograms of cocaine), where the offense was committed after "two or more convictions for felony drug offenses have become final." The defendant argued that the enhancement was inapplicable because his prior offenses had been state offenses, convicted upon the filing of informations, rather than upon indictments or waivers of indictment. The appellate court held that 21 U.S.C. § 851(a)(2) requires only that the "instant offense" be brought by indictment or waiver of indictment, and not the prior offenses.

POST-BOOKER (*UNITED STATES V. BOOKER*, 125 S. Ct. 738 (2005))

Plain Error Review

United States v. Rodriguez, 398 F.3d 1291 (11th Cir.), *cert. denied*, 2005 WL 483174 (2005). For the first time after *Booker*, the court announced its approach to the plain error analysis of sentences imposed in violation of *Booker*. The court found that the *Booker* error in enhancing a sentence based upon facts found by the judge that went beyond the facts admitted by the defendant or found by the jury did not constitute plain error. The Eleventh Circuit declined to follow the various approaches of its sister circuits relating to the third prong of the plain error test. Reasoning that plain error review should be exercised sparingly, the court determined that the defendant was unable to establish a reasonable probability that, if the district court had considered the guideline range as advisory, instead of mandatory, and had taken into account any otherwise unconsidered sentencing factors, the court would have imposed a lesser sentence than it did. Where the effect of an error on the result in the district court is uncertain or indeterminate, a defendant seeking to establish plain error has not met his burden of showing a reasonable probability that the result would have been different but for the error.

United States v. Curtis, 400 F.3d 1334 (11th Cir. 2005). The defendant, who raised a *Booker* claim for the first time on appeal, could not establish the third prong of the plain error test analysis. The judge sentenced the defendant to the maximum term of imprisonment permitted by the applicable guideline, an action that was inconsistent with any suggestion that the sentencing judge might have imposed a lower sentence if the judge had realized that the guidelines were advisory. *See also United States v. Fields*, 408 F.3d 1356 (11th Cir. 2005). (Mere fact that the district court had imposed a pre-*Booker* sentence at low end of guidelines range was insufficient to show that there was reasonable probability that its mandatory application of sentencing guidelines had adversely affected the defendant's sentence, as required to correct the error on plain error review).

United States v. Shelton, 400 F.3d 1325 (11th Cir. 2005). For the first time on appeal, the defendant raised Sixth Amendment challenges to his sentence. The court found that the defendant met the standard for the third prong of the plain error test. Throughout the sentencing, the trial court stated that the guidelines sentence was too severe and that the defendant's criminal history overstated his background and then stated that the most lenient sentence it could impose was more than appropriate. Finally, the fourth prong of the plain error test was satisfied because

the error affected the fairness, integrity or public reputation of the judicial proceedings. *See also United States v. Henderson*, 2005 WL 1208311 (11th Cir. 2005) (Sentencing court's use of facts it found by preponderance of evidence to enhance defendant's sentence beyond maximum authorized by facts established by jury's verdict, in prosecution of police officer for use of excessive force, was plain error given the fact that the court sentenced the defendant to the lowest permissible sentence under the mandatory guidelines, while voicing a belief that such sentence was still too high, was sufficient to establish that the error affected the officer's substantial rights); *United States v. Martinez*, 407 F.3d 1170 (11th Cir. 2005) (the district court committed plain error when it applied the Sentencing Guidelines as mandatory in sentencing the defendant, and such error affected defendant's substantial rights, warranting remand where the district court expressed a clear desire to impose a more lenient sentence).

United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005). The defendant argued for the first time on appeal that the special verdict by the jury, finding that the conspiracy involved only cocaine powder, precluded the district court from sentencing the defendant based on its finding that some of the cocaine powder had been converted into crack cocaine. Following circuit precedent, the appellate court held that the defendant could not show that the error affected his substantial rights. A sentencing court is permitted to consider relevant conduct of which the defendant was acquitted, as long as the government proves the acquitted conduct relied on by a preponderance of the evidence. *Booker* did not suggest that the consideration of acquitted conduct violates the Sixth Amendment as long as the judge did not impose a sentence that exceeds what is authorized by the jury verdict. Under *Booker*, the court can continue to consider acquitted conduct when applying the guidelines in an advisory manner.

United States v. Dowling, 403 F.3d 1242 (11th Cir. 2005). The defendant did not preserve her *Booker* error. Accordingly, the court reviewed for plain error. The defendant was not able to show that there was a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case. Nothing in the record indicated that the judge might have imposed a different sentence in the new advisory regime. Although the sentencing judge did express some concern and an "intellectual difficulty" with applying the Guidelines' cross reference for murder because murder was not charged by the prosecutor, even if the judge had not applied the enhancement for murder, the defendant's sentence would have been the same twenty year maximum allowed by the United States Code. The defendant therefore did not meet her burden to show prejudice and overcome the third prong of plain error analysis.

United States v. Dockery, 401 F.3d 1261 (11th Cir. 2005). On appeal, the defendant challenged a number of sentencing enhancements, but did not raise a constitutional challenge to the sentence, under *Apprendi* or any other case extending or applying the *Apprendi* principle. The court affirmed the sentence and the defendant filed a *petition for certiorari*. The Supreme Court vacated and remanded for consideration in light of *Booker*. On remand, the Eleventh Circuit reinstated the previous opinion, finding that the defendant had abandoned the *Booker* issue by not raising it in the briefs filed with the court. Moreover, the court concluded that nothing in the remand order required consideration of the issue as though it had been timely raised.

Harmless Error Review

United States v. Paz, 405 F.3d 946 (11th Cir. 2005). This appeal presented the first opportunity, after *Booker*, for the court to address the application of harmless error to a sentence imposed using extra-verdict enhancements in a mandatory guideline system. The defendant appealed his sentence entered after he pleaded guilty to producing, using, and trafficking in one or more counterfeit access devices with intent to defraud. His sentence was determined with a six-level enhancement based on a finding, not admitted by the defendant, that the amount of loss was between \$30,000 and \$70,000. The defendant objected to the enhancement as a violation of the Sixth Amendment as interpreted in *Blakely*.¹ Because the defendant preserved the *Booker* error, the court of appeals reviewed the sentence *de novo*. In this particular case, the court determined that government failed to carry its burden of establishing that the application of the extra-verdict enhancement was harmless error, given the district court's statement that it would have imposed a lesser sentence had the guidelines not been mandatory. The court vacated the sentence and remanded to the district court for resentencing.

United States v. Garcia, 405 F.3d 1260 (11th Cir. 2005). The defendant appealed the district court's factual determination at sentencing that he was responsible for 312 marijuana plants when the jury specifically found in a special interrogatory verdict that he was not responsible for more than 100 marijuana plants. The district court's factual finding was based on the evidence presented at trial and proven to the court's satisfaction by a preponderance of the evidence at the sentencing. The defendant adequately preserved the claim. He clearly raised this *Apprendi*²-type constitutional claim in his objections to the PSR and at sentencing. He then raised the constitutional claim again in his initial brief, and, in his supplemental brief, he specifically challenged the factual finding by the district court in light of *Blakely*. Because the district court sentenced under a mandatory guideline system, the defendant's sentence violated the Sixth Amendment. Consistent with the Supreme Court's remand in *Booker*, the Eleventh Circuit vacated the judgment and remanded for resentencing.

United States v. Mathenia, 2005 WL 1201455 (11th Cir. 2005). The court reviews the defendant's properly preserved *Booker* claim, whether based on the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge (a constitutional *Booker* claim) or based solely on the sentencing judge's mandatory application of the sentencing guidelines (a statutory *Booker* claim), in order to determine whether error was harmless. The district court's statutory *Booker* error, arising from its mandatory application of the sentencing guidelines, was harmless where the district court, in anticipation of the Supreme Court's decision in *Booker*, had expressly indicated in imposing sentence that the same sentence would have been imposed if the guidelines did not control and if the district court had looked to them only for their persuasive or advisory value.

Waiver of Appeal

United States v. Rubbo, 396 F.3d 1330 (11th Cir. 2005). As part of her plea agreement, the defendant waived the right to appeal her sentence unless the sentence exceeded the maximum permitted by statute. The defendant contended that the term "maximum permitted by statute"

¹*Blakely v. Washington*, 542 U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

²*Apprendi v. New Jersey*, 530 U.S. 466 (2000).

was the same as the statutory maximum referred to in *Apprendi/Blakely/Booker* line of cases, and therefore that the appeal waiver did not bar her from raising a sentencing issue under *Booker*. The Eleventh Circuit rejected this reasoning, holding that in the *Apprendi* line of cases, the Supreme Court's ruling had nothing to do with the scope of an appeal waiver. Plea bargains are like contracts and should be interpreted in accord with what the parties intended. There was nothing to indicate that when the parties entered into the plea agreement and used the referenced language that they intended those words to have anything other than their usual meaning.

United States v. Grinard-Henry, 399 F.3d 1294 (11th Cir.), *cert. denied*, 125 S.Ct. 2279 (2005). As part of his plea agreement, the defendant waived the right to appeal his sentence with certain limited exceptions: 1) an upward departure; 2) a sentence above the statutory maximum; 3) a sentence in violation of the law apart from the sentencing guidelines; and 4) an appeal by the government. The appellate court held that the defendant waived the right to appeal on the basis of the *Apprendi/Blakely/Booker* issue since the issue did not fall within any of the listed exceptions. The term "statutory maximum" refers to the longest sentence that the statute which punishes the crime permits the court to impose, regardless of whether the sentence may be shortened because of the principles involved in *Booker*. The defendant's sentence did not exceed the statutory maximum, nor did he allege a violation of the law apart from the guidelines. Rather, the appeal asserted that the sentencing guidelines were unconstitutionally applied to the defendant. Thus, the appeal directly involved the application of the guidelines and fell squarely within the terms of the defendant's appeal waiver. *See also United States v. Frye*, 402 F.3d 1123 (11th Cir. 2005) (Knowing and voluntary appeal waiver contained in the defendant's plea agreement barred the defendant's appeal from his sentence, challenging the district court's enhancement of his sentence using mandatory sentencing guidelines).

Williams v. United States, 396 F.3d 1340 (11th Cir. 2005). The defendant's plea agreement provided that he waived the right to appeal his sentence either directly or collaterally. Notwithstanding this provision, the defendant filed a *pro se* petition alleging that he received ineffective assistance of counsel at sentencing. The Eleventh Circuit held that a valid sentence-appeal waiver, entered into voluntarily and knowingly, pursuant to a plea agreement, precluded the defendant from attempting to attack, in a collateral proceeding, the sentence through a claim of ineffective assistance of counsel during sentencing. The plain language of the plea agreement informed the defendant that he was waiving a collateral attack on his sentence and the trial court specifically questioned the defendant about the specifics of the waiver, before determining that he knowingly and voluntarily entered into the plea agreement.

Cases on Collateral Review

In re Anderson, 396 F.3d 1336 (11th Cir. 2005). The petitioner sought to leave to file a successive § 2255 based upon the new rule of constitutional law announced in *Blakely* and *Booker*. For a new rule of constitutional law to be grounds for a successive § 2255 petition, it must have been made retroactive to cases on collateral review by the Supreme Court. Because the Supreme Court has not expressly declared *Booker* to be retroactive of cases on collateral review, the appellate court found that the petitioner had failed to make a prima facie showing of the existence of either of the grounds set forth § 2255, and denied his application for leave to file a second or successive motion. *See also Varela v. United States*, 400 F.3d 864 (11th Cir. 2005)

(concluding that *Booker*'s constitutional rule falls squarely under the category of new rules of criminal procedure that do not apply retroactively to § 2255 cases on collateral review). C.A.11,2005.

Prior Convictions

United States v. Orduno-Mireles, 405 F.3d 960 (11th Cir. 2005). The district court applied the crime of violence enhancement under §2L1.2. The defendant challenged the enhancement on various grounds, including the Sixth Amendment. The court held that *Booker* was not implicated in this case where the defendant's sentence was enhanced based on a prior conviction. The defendant's prior convictions had been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *See also United States v. Phillips*, 2005 WL 1459431 (11th Cir. 2005).

Review of Guideline Calculations

United States v. Crawford, 407 F.3d 1174 (11th Cir. 2005). The Eleventh Circuit held that *Booker* does not alter the court's review of the application of the guidelines. *Booker* requires the sentencing court to consult the guidelines and take them into account when sentencing. Accordingly, the consultation requirement obliges the district court to calculate correctly the applicable guidelines.